applicants and otherwise granting preferential treatment to white applicants, provided employment opportunities to white applicants not generally provided to Negro applicants.

Further admitted examples of this follow:

(a) Preferential treatments in new hiring and assignment was accorded by the Supervisor of Employment to residents of Angola and all white suburban areas near Lackawanna. This practice was known to the Office of Management's Representative who is responsible to Plant management who is, in turn, responsible to management at the corporate level.

In the summer of 1966, 26 Negroes out of 1100 summer employees were hired; in 1967, 12 out of 478.

Management and other supervisory personnel of the Plant compiled a "Golden List" designated "AU" (the chemical symbol for gold) which contained the names of a selected group of prospective summer employees who were given preferential treatment including assurance of a job, rapid processing and favorable job assignment. The employment applications of such persons were designated with the symbol "AU." No Negro has ever been on the "Golden List."

(b) The Plant followed a pattern or practice of discrimination in assignment of Negroes and whites to departments between July 2, 1965 and October 1, 1967, by assigning 20% of newly-hired whites and 50% of newly-hired Negroes to five departments of the 82 departments in the Plant as follows: 404 (Brickmason-Labor Unit), 503 (Blast Furnace Sintering), 512 (Coke Oven), 520 (Blast Furnace) and 530 (Steelmaking). These five departments then comprised only 19% of total Plant hourly paid employees but are admittedly among the hotter and dirtier places of employment in the Plant. The assignment of Negroes to these five departments, it is admitted, was in part premised on the view of the employment office that Negroes could stand the heat better than white employees (Stip. p. 12–13).

(c) Departments which have been traditionally white have remained so because of the Plant's practice which continued to October 1, 1967, of not assigning Negroes to those departments or the practice of some white supervisory personnel of rejecting Negroes when they were assigned to those departments (Stip. p. 15), prior to October 1, 1967.

The result of Bethlehem's racial assignment has been that Negroes have been involuntarily concentrated in only the following eleven of the Plant's 82 departments: Departments 404 (Brickmason Labor), 406 (Yard), 503 (Sintering Plant), 512 (Coke Ovens), 520 (Blast Furnaces), 530 (Steelmaking), 612 (44"–32" Mills), 620 (Billet Yard), 631 (12"–10"–8" Bar Mills), 660 (Mill) and 662 (14" Mill). As of October 21, 1967, these eleven departments contained 83.6% of all Negro employees in the Plant.

Since at least 1961, the union has been aware that most of the Negroes in the Plant were concentrated in the eleven departments and that this concentration resulted from Bethlehem's assignment policies. In short, all the defendants knew of the racially discriminatory assignment of Negroes in the Plant.

In addition to the assignment of Negroes to the eleven departments, Bethlehem excluded Negroes from the higher paying and cleaner departments of the electrical and mechanical divisions. Bethlehem stipulated that "until September 1967 the Plant pursued a policy or practice of excluding qualified Negroes from the Electrical Division departments and had on occasion hired and assigned whites to those departments without regard to their qualifications. As of December 8, 1967, the Division employed 1,364 persons, of whom only eleven were Negro." Similarly, Bethlehem has admitted that "until September 1967, the Plant pursued a policy or practice of excluding qualified Negroes from certain Mechanical

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...s of December 8, 1967, ... Division employed 3,690 persons, of whom 341 were Negro. Two hundred forty-eight of the 341 Negroes were in a non-mechanical laborer unit in the Brickmason Department, the only Mechanical Department which has a large non-mechanical labor unit." The average pay of employees in the Laborer unit of the Brickmason Department is significantly lower than the average pay for craft workers in the same unit.

The union has been aware, since the effective date of Title VII of the Civil Rights Act of 1964, of the pattern of racial assignments to the various departments of the Lackawanna Plant.

SELECTION OF SUPERVISORY EMPLOYEES

Until September 1967, the Plant admitted pursuing a practice of generally excluding Negroes from supervisory positions by basing promotion on essentially subjective determinations. Additionally, in some instances the Plant transferred white employees from traditionally white departments into predominantly Negro departments to assume supervisory positions. The practice has restricted the number of Negro supervisory personnel. In short, defendant Bethlehem engaged in racially discriminatory conduct with regard to hiring, assignment and promotion both prior to and after the effective date of Title VII. These discriminatory employment practices continued up to September 1967 when the United States began its inquiry into Bethlehem's practices.

Nothing could be clearer than that Bethlehem, as it admitted, has engaged in an unlawful pattern and practice of racial discrimination in employment in violation of Title VII of the Civil Rights Act of 1964.

RELIEF REQUESTED

The Attorney General asks this court to grant relief in three respects as follows:

(a) the Attorney General seeks to obtain right of transfer for any Negro in the eleven departments who was or may have been discriminatorily assigned prior to October 1, 1967. Such a Negro would be entitled to first priority to transfer to any vacancy in any of the other 63 departments with a guarantee that the pay he would receive in his new job would be at least equal to his average hourly earnings (including overtime and incentive) in his former job. If his new department did not have any job which paid so well, he would be paid at the rate of the top job in his new department. In addition, he would have superseniority, that is, he would be entitled to use his continuous Plant service, not unit seniority, to bid for vacancies in his new unit;

(b) the Attorney General seeks to suspend for five years the application of Appendix 10 of the currently effective Master Agreement which provides that craft apprenticeship vacancies shall be filled on the basis of relative seniority first from within the seniority unit, then from within the pool area including the seniority unit, then from within the Plant and lastly from among new hires. Instead, the Attorney General would require the company to consider Negro applicants from anywhere in the Plant or from off the street for apprenticeship vacancies; and

(c) the Attorney General seeks special relief with respect to the Coke Ovens Department, specifically to provide a right of transfer for any Negro, hired prior to October 1, 1967, and assigned to the Battery or Coal Handling units, to fill any vacancy in one of the other units with rate retention and superseniority.

In order to determine whether such relief is warranted, the facts surrounding the present transfer system must be considered. Consideration should also be given to the specific facts regarding the Coke Ovens Department and the Apprentice program.

THE SENIORITY STRUCTURE OF THE PLANT

There are 82 departments at the Plant, each of which has a special function in

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the production of steel products, maintenance of facilities or servicing of the production departments of the Plant. Of the 82 departments, eight have no bargaining-unit hourly paid employees. The 74 remaining departments, the "production" departments, vary to a large degree in size, number of seniority units, function, worker skill required, rate of pay and type of hazard encountered. Although the departments are geographically located close to one another, their functions interrelate only vertically. They are disparate as working entities and as to processes utilized and products produced. Except as otherwise specifically designated herein, the court's discussion will be confined to the 74 production departments.

For purposes of promotion, job assignment and pay, there are 81 seniority units, some of which coincide with the departmental organization of the Plant. In certain departments the operations performed are so diverse that more than one seniority unit has been established, as in the Coke Ovens Department which is made up of four quite different seniority units and a Labor Gang. Within the seniority units are functionally structured lines of progression along which a worker may progress, or in slack periods be required to regress, from job to job. There are 285 lines of progression in the Plant. The general establishment of seniority units and lines of progression preceded the formation of the union, operating as a matter of custom and usage between the company and the employees. When the union came on the scene, it accepted the existing structure. Every functionally integrated steel plant in the United States has a multiple-unit seniority system.

After the initial assignment of an employee by the company to a particular department, his further assignment, layoff and transfer rights are based on a system of seniority detailed herein. This seniority system is in use throughout the entire basic steel industry in the United States and is not peculiar to, and was not designed solely [illegible] Plant or even this company. It is, therefore, plain that any substantial court ordered revision or modification of the seniority system now in operation at the Plant would have significant implications for the entire basic steel industry.

The Master Agreement is negotiated between representatives of the International Union and representatives of the basic steel industry. It is applied and adapted in accordance with its terms by the company and the Locals to the practices, customs and usages at the Plant as at each of the other basic steel companies and plants throughout the country. Certain specific responsibilities are reserved in the Master Agreement to the Locals. The principles of the seniority system, as negotiated between the company and the International Union, apply to the various plants of the company, are embodied in the present Master Agreement entered into by them under date of August 1, 1968, and prior thereto in earlier Master Agreements.

The seniority system itself, as embodied in the Master Agreement and implementing agreements relating to the Plant, was not and is not designed or motivated by racial discrimination and does not result in racial discrimination and the government does not contend otherwise.

Article X, Section 8, of the April 1962, Master Agreement required the establishment of "agreed upon" or "pool" areas. Each pool was to embrace at least one major operating unit within which all employees' rights in respect of layoff and recall from the industrial plant were to be determined in accordance with continuous plant service. The stated purpose for establishing pool areas was to provide greater overall protection from layoff for longer-service employees.

At the Plant 36 pool areas, each comprised of one or more of the existing seniority units, were established by agreement between the union and the company. Jobs classified as "pool" jobs in any given pool area are avail-

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employee in a seniority unit in the particular pool area with two or more years of continuous Plant service who by reason of lack of seniority has been demoted within and laid off from his seniority unit because of lack of work. His layoff and recall rights in the pool are thereafter determined in accordance with continuous Plant service. The composition of the pool areas has been, since 1962, governed by Local Seniority Agreements implementing the Master Agreement. Appendices to the Local Seniority Agreements list the pool areas at the Plant and the "pool jobs" within each area, which are effective during the period of each such agreement. Under the agreements at the Plant, all of the jobs in job classes 1, 2 and 3 and jobs constituting two-thirds of the worker population in job class 4 are designated "pool jobs." Those lower-rated jobs were chosen because few of the skills developed by experience in the line of progression are necessary for their performance.

Jobs in the steel industry have been classified for pay purposes through industry-wide negotiations with the International Union. Pursuant to an order of the National War Labor Board dated November 24, 1944, the steel industry, International Union and management, undertook to classify each job in each plant and standardize the wages for each. The results of those efforts, as updated, are now embodied in a job Description and Classification Manual most recently published under date of January 1, 1963. Twelve specific criteria are applied to classify each job:

(1) Pre-Employment Training;

(2) Employment Training and Experience;

(3) Mental Skill;

(4) Manual Skill;

(5) Responsibility for Materials;

(6) Responsibility for Tools and Equipment;

(7) Responsibility for Operations;

(8) Responsibility for Safety of Others;

(9) Mental Effort;

(10) Physical Effort;

(11) Surroundings; and

(12) Hazards.

TRANSFER PROVISIONS

Prior to 1962, the agreements between the company and the union contained no provision giving employees the right to transfer from one department to another within the Plant. This was also true of most of the other plants in the steel industry. As a practical matter, therefore, Negroes assigned to the eleven departments had no way, prior to 1962, to escape those departments and enter other departments which might have offered better long-term financial opportunities. This was equally true, of course, for the whites who were assigned to the eleven departments, and for the whites who were assigned to the many other departments affording financial opportunities inferior to the eleven departments—they, too, had no way to escape from the department to which they were assigned. The union has sought to obtain transfer rights in the steel industry at least since 1954, but it was unable to win such rights in negotiations until 1962.

In 1962, the union and the eleven steel companies bargaining together as the Steel Companies' Coordinating Committee agreed to adopt an industry-wide provision which would enable employees to transfer from one department in a plant to another. These transfer rights were broadened and strengthened in the 1965 and 1968 agreements. One of the factors which prompted the union to seek transfer rights was its awareness that in many steel plants Negroes had been assigned predominantly only to certain departments, and that only through a transfer procedure could the effects of this assignment pattern be overcome.

Under the 1962 agreements, "agreed upon areas" (sometimes called "pool areas") were to be established in each

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plant. A vacancy not filled from within a seniority unit would be made available to the most senior qualified employee working anywhere within the "agreed-upon area" who sought the vacancy. This provision entitled employees to transfer from one department to another within the "agreed-upon area." It did not, however, entitle employees to transfer to departments outside their "agreed-upon area."

The 1965 agreement broadened transfer rights so that they became plantwide. Under the 1965 agreement, a vacancy not filled from within a seniority unit would be made available to employees seeking transfer in accordance with the following system of priorities:

First, to the most senior qualified employee working within the "agreed-upon area" who sought the vacancy (under the Bethlehem agreement, this is known as a "Section 12(a)" transfer);

Second, if not filled from within the "agreed-upon area," to the most senior qualified employee working anywhere in the Plant who sought the vacancy (under the Bethlehem agreement, this is known as a "Section 12(b)" transfer).

Under the 1965 agreement, employees were entitled to bid for Section 12(a) transfers after they worked in the Plant for six months, and for Section 12(b) transfers after they had worked in the Plant for two years. The Steel Companies Coordinating Committee insisted upon the two-year requirement in the fear that new employees would seek repeated transfers before they grew accustomed to their initial assignments. Under both the 1962 and 1965 agreements, employees who transferred from one department to another received the pay of the job to which they transferred, and were governed by the following seniority rules:

(a) For purposes of layoff and recall, their plant-wide seniority governed.

(b) For purposes of promotion and demotion, their unit or departmental seniority (i. e., seniority beginning on the date the transfer was effec
ed.

This absence of rate retention and
of seniority carryover for promotion
demotion purposes is common to
functionally integrated plant in the
industry.

During the three-year term of
1965 agreement, there were a total
306 applications for transfer under
tions 12(a) and (b) at the Lacka
Plant, filed by 267 employees (some
ployees applied for more than one tr
fer). Of this total, 47 applications
filed by 43 Negro employees.

Many of those, white and Negro,
applied for and accepted transfer
so despite the fact that they suff
a short-term cut in pay (because
new job paid less than the old)
sacrificed substantial seniority for
motion and demotion purposes
count of the transfers. At leas
transferees (21 whites and 4 Negr
suffered an immediate cut in pa
reason of the transfer. Sixty-tw
the transferees (57 whites and 5
groes) had seven or more years o
vice (some had as many as 19
years), yet they transferred and
the new department without se
carryover for promotion and dow
ing purposes. This experience i
nificant, for it demonstrates th
absence of rate retention and se
carryover is not a complete de
to employees' transferring. Em
are willing to take short-term pa
and to give up their former unit
ity, when sufficiently attractive
term opportunities arise in oth
partments.

Furthermore, it appears that th
porary economic set-back suffere
transferring employee would be o
short duration. Evidence wa
duced concerning the largest depa
in the Plant, Department 670
Mill). This department has mor
2000 jobs, and would be one of th
cipal recipients of transferees.
department, employees entering
tober, 1967, and beginning t

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seniority at that point averaged fifty cents per hour more than the pay of the entry level job during their first ten months. Since most of them started at the entry level job, this means that at the end of the ten month period they were enjoying earnings substantially greater than fifty cents per hour above the entry level job. During that ten month period, many of these new employees rose to high-paying positions. This specific example is corroborated by plant-wide statistics indicating that employees with less than two years service average nearly 75 cents per hour above the lowest rate in the Plant, and employees with two to five years of service average nearly $1.35 per hour above the lowest rate in the Plant. It is thus apparent that an employee who transferred without the special remedies sought by the government nevertheless would progress at a rapid rate to relatively high-paying jobs in his new department.

THE EFFECT THE PRESENT SYSTEM OF TRANSFER AND SENIORITY HAS ON PAST PRACTICES OF DISCRIMINATION AT THE BETHLEHEM PLANT

There are 36 pools at Bethlehem, Lackawanna. One entire union local, Local 2602, is composed of 22 departments which constitute separate pools. All of the apprenticeable crafts are located within those departments. All but one of those departments (Department 404) are almost entirely white as the result of the discriminatory assignment and apprenticeship policies followed by Bethlehem. Therefore, the "intra-pool" transfer provisions mentioned previously were meaningless as to those units.

Thus, the proliferation of pools discriminatorily reduces the freedom of movement of Negro employees because under the Master Agreement intra-pool transfers have priority over transfer persons into a different pool.[1]

Three of the major production depa ments, Coke Ovens—512; Blast Furna —520; and Steelmaking—530 (to whi Negroes were historically discriminato ily assigned regardless of their quali cations) have included within each their respective pools the all-wh Electrical and almost entirely all-wh Mechanical Departments which suppo those units. These predominantly Neg units provide almost all of the pool jo in each of the three pools and, therefo provide job security to the white un without receiving any job security fr the white units in return.

In one pool in which the major produ tion unit is almost entirely white, t Strip-Mill, Department 670, the all-wh Electrical and Mechanical units whi support it (and which would gain j security at the expense of the Strip-Mi are not in the same pool.

Under Article X, Section 6, of the 19 Agreement, an employee did not acqui any seniority until the expiration of s months, after which the length of h continuous service was computed fro the date of his original employmen Consequently, a 12(a) transfer could had only after he had six months service in the Plant. The 1968 Agre ment still requires six months of Pla continuous service for eligibility transfer under Section 12(a). In e fecting a transfer under 12(a), th transferring employee had to give u basically the same accrued rights d scribed above in the discussion of 12(b transfers.

In other words, an employee wh chooses to exercise either of these tran fer rights must forfeit all of the benefit of seniority which he had accrued in hi pre-transfer position, such as pay rat promotion opportunities, protectio against demotion, job selection, and ente

[1] Art. X, Section 12(b) of the 1965 Master Agreement (G–8) required an employee to have two years plant continuous service before he could transfer between pool areas. The 1968 Master Agreement (G–8, Art. X, Section 12(b)) reduced that period to one year.

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the new unit as a new man, generally going to the entry level job.

The court finds as fact that the transfer and seniority system negotiated in the 1962, 1965 and 1968 Master Agreements by the company and union, operates (as described above) in such a way as to tend to lock an employee into the department to which he has been assigned. This lock-in effect becomes stronger as an employee's length of service increases in a department. This means that the longer a Negro has worked in the hot and dirty department to which he was admittedly discriminatorily assigned, the more he has to lose by transfer.

DISCRIMINATION IN THE APPRENTICESHIP PROGRAM

Since 1946, Bethlehem has operated an apprenticeship training program to train employees in thirteen highly paid craft job areas. Until August 1, 1968, admission to the apprenticeship program was under the exclusive control of Bethlehem. From its inception in 1946 until September 1, 1967, a total of 567 craftsmen were graduated from this apprenticeship program, only six of whom were Negro. All of the Negroes were trained as bricklayers.

The Plant admittedly gave preferential consideration to white apprenticeship applicants, to the detriment of Negroes. Between July 2, 1965 and September 1, 1967, at least eleven Negro apprentice applicants were rejected on the basis of deficiencies in one or more of the announced qualifications for the program while during the same period at least 25 whites were accepted for training despite similar deficiencies.

A number of Negroes applying for the program were discriminated against in various other respects, and a total of at least 40 Negroes who qualified for the apprenticeship program have been discriminatorily rejected by the Plant since July 2, 1965.

As of September 6, 1968, there were a total of 126 apprentices in the Plant's apprenticeship training program. Of that number, which included ten Negroes, 33 had been hired directly "off the street" into the program rather than having been assigned to the program from other work areas at the Plant (Ex. G–26). Bethlehem admitted and the court found in its pre-trial order that the hiring and assignment practices in the apprenticeship program were racially discriminatory.

On the basis of this admission of discrimination, this court entered an agreed pre-trial order containing *inter alia* prospective relief provisions relating to the apprenticeship program. Under the order, Bethlehem is required to take certain enumerated steps to insure equal opportunity to Negroes in entering the apprenticeship program in the future. Since the union had not been involved with the apprenticeship program as it had existed theretofore, the union was specifically exempted from the relief provisions of the pre-trial order dealing with the apprenticeship program.

During a pre-trial conference, the court was advised by counsel for the government that on August 1, 1968, as a result of negotiations between Bethlehem and the union, selection to the apprenticeship program for the first time was removed from the exclusive control of the Plant by virtue of an agreement embodied in Appendix 10 of the 1968 contract to use the seniority system in filling apprenticeship openings. At the time of trial, union officials testified that the agreement means that the selection of apprentices will now be in the following order of priority:

1. From within the department in which the apprenticeship is located;
2. From among the Plant employees on a plant-wide basis; and
3. New employees from the outside.

Although the new system of selection has much to recommend it over the former arbitrary system of selection

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...inatory assignment to craft departments, the court finds that this system cannot be superimposed on the set of facts presently existing at the Lackawanna Plant. The inevitable effect of this agreement, because of the admitted racial composition of the departments in which the apprenticeable jobs are found, is and will be to give a preference to white persons in all of the apprenticeship crafts except one, *viz.*, Department 404 (Brickmason). This preference is a direct and necessary result of practices which this court has already found to be discriminatory and in violation of the 1964 Civil Rights Act. There is no justification for Bethlehem and the union to erect a new system which under these facts necessarily perpetuates a prior discriminatory situation. The new system of apprenticeship, since it is founded on a discriminatorily determined departmental situation, tends to extend and continue the past discrimination in violation of the Civil Rights Act of 1964 and should be altered.

On December 8, 1967, there were only 31 Negroes among the 1908 employees in the 12 departments, other than Department 404, to which apprentices are assigned. It is highly relevant to note that this situation is a direct result of discriminatory assignments carried out before and *after* the effective date of Title VII.

[1] Since the new system makes an employment opportunity (entry into the apprenticeship program) contingent upon a status which Negroes were unlawfully prevented from achieving, that is, employment in one of the twelve apprenticeable departments in question, that system is also discriminatory and violative of Section 707(a) of the 1964 Civil Rights Act (42 U.S.C. § 2000e-6(a)).

The union attempts to justify the use of the selection procedure under Appendix 10 on the basis of the fact that it is attempting to establish the same procedure in the steel industry as a whole. ...this, it argues that the application of Appendix 10 to the apprenticeship program was not selected to discriminate against Negroes.

However, whether or not application of the Appendix 10 selection procedure is a nation-wide union goal, and whether or not it would produce substantial Negro participation under a fact situation existing at a different steel plant, is immaterial and irrelevant to the instant situation, where company assignment practices prior to and following the effective date of Title VII resulted in exclusively or predominantly white departments from which apprenticeships under Appendix 10 would be filled on a priority basis. When the natural consequences of conduct in the given situation result in the denial of equal employment opportunities for Negroes, the purported reasons are immaterial and the natural consequences must be held to have been intended.

However, Department 404 (Brickmason) has not been the exclusive domain of white employees as have the other twelve departments with apprenticeable jobs. For example, Department 404 had 243 Negroes out of a total of 503 employees as of December 9, 1967. This large number of Negroes resulted from the Plant's practice until September 1967 of assigning Negroes to the laborer or helper jobs which are among the hotter and dirtier jobs in the Plant. Testimony at trial revealed that brickmason laborers spend most of their time in "holes and sewers." Since Negroes have not been excluded from Department 404, they have not been denied the status upon which eligibility for apprenticeship selection under Appendix 10 would depend. The government concedes that this is the case, and the court finds that Appendix 10 may be applied to Department 404 without violating Title VII.

COKE OVENS DEPARTMENT 512

The Coke Ovens Department is a production unit that produces coke for the rest of the steel plant to be used in making steel. The basic production unit within the Coke Ovens is the Battery

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Unit which consists of a series of ovens which reduce coal to coke. Because of the working conditions on the Batteries, the Coke Ovens Department was considered to be one of the hottest and dirtiest places in the Plant to work and for this reason, prior to September 1967, the Plant pursued a pattern or practice of assigning Negroes to the Coke Ovens Department regardless of their qualifications for other positions.

Department 512 has four separate seniority units. The Battery and Coal Handling Units, which have the lowest maximum pay rates in the department, job class 11, are 79% and 48% Negro, respectively; the By-Products and Heating Units, which have the highest top job grades in the department (job classes 15 and 18, respectively) are 15% and 26% Negro, respectively. One of the causes of the racial composition of these units was the racial discriminatory assignment of Negroes to the department. However, the prime cause of the disproportionate number of Negroes in the Battery and Coal Handling Units was the discriminatory assignment of Negroes by the Coke Ovens supervision, regardless of their qualifications to those units because those units contain the hottest and dirtiest jobs. To prevent Negroes from exercising their seniority rights to enter into the predominantly white units in Department 512, the Coke Ovens management and Local 2601 superimposed a unit seniority system over the Coke Ovens units and locked the Negro employees in the Battery and Coal Handling Units by enforcing a no transfer provision.

Prior to 1970, Coke Ovens management had complete control over assignments to the units within the Coke Ovens. Such assignments were made on the basis of race and Negroes were generally assigned to the Batteries and to a lesser degree to the Coal Handling Units, whereas whites were assigned to the Electrical, Mechanical, By-Products and

In 1950, the first written Coke Ov... Department seniority agreement ... negotiated by Bethlehem and Local 26... This agreement established these ... as separate seniority units in the C... Ovens. Under this agreement, vacanc... in the units were to be filled from ... Coke Ovens labor gang on the basis ... departmental seniority. However, ... agreement did not provide that repl... ments could be obtained *only* from ... labor gang. It was the mutual ... standing between the Coke Ovens ... agement and Local 2601 that repl... ments to fill vacancies in the units w... also be obtained by allowing trans... from the various units in the Coke O... to fill the vacancies. This mutual ... standing provided that the transf... would enter the entry-level position ... the unit into which he desired to tr... fer and, consequently, he would lose ... pay rate and enter the new unit at ... entry-level job.

In 1952, new personnel moved into ... top supervisory positions of the C... Ovens. The new supervision impos... prohibition against transfer between ... seniority units in the Coke Ovens ... for the purpose of preventing Negr... from transferring into the white C... Oven units.

[2] Local 2601 acquiesced in the ... prohibition against transfers. ... newly elected president of Local 26... 1954 did not even become aware of ... Coke Ovens seniority system until ... In 1956, Local 2601 filed a grievan... questing that the seniority syste... altered so as to allow transfers, thu... ceding that the seniority system ... hibited transfers. Local 2601 with... this grievance before it was consi... by the arbitrator, after reading B... hem's brief. The Coke Ovens D... ment membership of Local 2601 in ... and 1963 never voted to retain any ... hibition against transfers. The ... vote on the issue of transfer w... corded in the grievance filed in 1... which the Coke Ovens employe...

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the membership had voted to retain a no-transfer provision, Local 2601 would have still had the duty to negotiate a system that would alleviate the discriminatory assignment patterns.

In 1962, the company and union negotiated transfer rights which gave employees the right to transfer between seniority units into vacant positions. This right to transfer between seniority units was limited to seniority units which were encompassed within the same pool for lay-off and recall purposes.

In 1965 and 1968, the transfer rights between seniority units in the same pool areas were renegotiated and remained in effect. In spite of the 1950 seniority agreement pertaining to the Coke Ovens, Local 2601 interpreted the transfer of right provision in the 1962, 1965 and 1968 contracts to provide no transfer of right between the seniority units in the Coke Ovens Department, even though these units were in the same department and a *fortiori* in the same pool area. Local 2601 affirmatively enforced this interpretation and both before *and after* 1965, the effective date of Title VII, instructed its membership that there was no right to transfer and took no action to enforce Negro employees' right to transfer within the Coke Ovens when such rights were denied by the Coke Ovens Management. Bethlehem continued to prohibit transfers until August of 1968. However, Local 2601 continued to contend that the seniority system prohibited transfers until December of 1968 when the trial of this case was almost completed.

The prohibition against transfers instituted in 1952, was instituted for the purpose of discriminating against Negroes. Local 2601's acquiescence therein established that prohibition as part and parcel of the Coke Ovens seniority system. The Coke Ovens unit seniority system and prohibition against transfer had the purpose and effect of segregating Negroes within the Coke Ovens and denying them equal opportunity of employment in the Coke Ovens.

The Master Agreements provide that new employees have no seniority rights for the first 30 days of their employment. One of the methods of effecting the racial assignment to the different units in the Coke Ovens Department was to manipulate the Coke Ovens Department seniority system by assigning Negroes out of the labor gang after they had been in the labor gang anywhere from three days to two weeks and therefore had not yet accrued enough service to have any seniority rights, primarily to the Batteries Unit and also to the Coal Handling Unit. Company records indicate that Negro employees have complained about such practices since 1956. These Negro employees were told only that they were to work on the Batteries and were sometimes not told whether or not their assignments were permanent but were always informed that transfers between units were not allowed.

Although there is credible evidence on the record to indicate that in *some* instances Negroes preferred assignment to Batteries and Coal Handling because initial rates of pay are higher and employment tends to be steady in those units, a conclusion that this factor completely explains the present composition of the units and that their racial makeup at present is a result of non-discriminatory assignment of employees to the various units would be against the weight of evidence and would ignore the facts disclosed by the evidence.

While the company's Coke Ovens Department seniority records indicate that there have been no permanent assignments to the Batteries Unit since 1965, Negroes with Coke Ovens seniority dates since 1965 are working on the Batteries. While the company maintains that these people are really in the labor gang, the records of unit assignments maintained in the Coke Ovens indicate that several of these Negro employees, who have no record of any permanent assignment date to the Batteries, are recorded as filling

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the entry-level jobs in the Batteries Unit on a permanent basis. Seventy-three of these Negroes working on the Battery, hired since 1965, have more departmental seniority than do some white employees working in the By-Products and H... Units.

The seniority lists prepared for ea... unit in the Coke Ovens in December ... 1967 (Ex., G–52) reflect the following:

Unit	Total Employees	Total White	Total Negroes	Other Minorities
Battery	350	44	277	29
Coal Handling	79	30	39	10
By-Products	53	43	8	2
Heating	57	42	15	0
Labor Gang	18	5	12	1
	557	164	351	42

These figures indicate that of all the Negroes working in the Coke Ovens Department, 79% are working in the Battery Unit and 90% are working either in the Battery or in Coal Handling Units. At the same time, only 27% of the whites working in the Coke Ovens Department were working in the Battery Unit and only 45% of the whites were working in either the Battery or Coal Handling Units.

The seniority records of Negroes who worked in the Battery Unit from 1964 through 1965 and for whom dates of permanent assignment to that unit are indicated reflect that the average Negro working in that unit was permanently assigned to the Battery within 3.4 days after he was assigned to the Coke Ovens Department.

Complementing this racial assignment has been the practice of excluding Negroes from the By-Products laborer job both before and after July 2, 1965. Company records indicate that no Negroes presently working in the Coke Ovens Department had ever worked in the position of By-Products laborer. On the other hand, of the 53 employees working in the By-Products Unit, 22, all of them white, had entered the unit in the position of By-Products laborer. Negroes have been dissuaded from accepting the By-Products laborer job by being informed that they do not have the qualifications to operate the next By-Products job ab... the laborer job and therefore were t... that they could not progress above t... position of laborer in the By-Produ... Unit.

[3] The officers of Local 2601 h... long been aware of such practices. T... has been established by the fact t... various Negro stewards have complai... to the white officers of Local 2601 ab... such practices. The notice of such d... criminatory practices to Local ... placed upon the local the duty to t... whatever steps were lawful to alle... the discrimination and the effects of ... discrimination upon its Negro mem... ship. However, Local 2601 filed only ... grievance that might allege racial ... crimination until after the invest... tion of this case by the Department ... Justice.

Departments 417 and 427 are ... Mechanical and Electrical Units, re... tively, that prior to 1952 were units ... in the Coke Ovens Department. T... racial composition at that time ... white. In 1952 they were made sep... departments. Prior to their separa... from the Coke Ovens Department, ... Ovens employees were allowed to bi... those units from the Coke Ovens ... gang. After the separation of t... units from the Coke Ovens Depa... employees in the predominant...

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...partment could no longer ... into those units.

From 1962 until 1962 there was no transfer of right provisions that would allow transfers between the Coke Ovens Department and the Electrical and Mechanical Departments. Because of the separation of these units from the Coke Ovens and because of the continuing racially discriminatory assignment of Negroes to the Coke Ovens and white employees to the Electrical and Mechanical Departments by Bethlehem, the Electrical and Mechanical Departments remained almost entirely white. While the 1962 and 1965 Master Agreements provided for a transfer of right between units in pool # 1, Bethlehem prevented Negroes from transferring into the Mechanical and Electrical Units by the discriminatory application of tests.

The 1962, 1965 and 1968 Master Agreements negotiated by the union and Bethlehem provided for the creation of pools for the stated purpose of extending layoff and recall protection to senior employees. The actual composition of the pools in terms of which departments were to be joined together to create such pools and which jobs in those departments were to be included in pools as "pool jobs" were left up to the local unions and Bethlehem. Bethlehem and Local 2601 agreed to place Department 417 (Mechanical), Department 427 (Electrical), and the Coke Ovens Department together to create pool # 1. In a layoff situation, senior employees in the departments within a pool can move out of their departments into other departments and occupy pool jobs. The Mechanical Unit had only two jobs that are classified low enough to be included as pool jobs. The Electrical Unit had no jobs that were low enough to be pool jobs. Therefore, virtually all of the pool jobs in pool # 1 were contributed by the Coke Ovens Department. As a result of this composition, employees in the all-white Electrical and Mechanical Units can bump Coke Oven Department employees out of pool level jobs in the Coke Ovens Department in a layoff situation. The reverse is not true. Therefore, the employees of the all-white Mechanical and Electrical Units were afforded substantially more layoff and recall protection than were the employees of the predominantly Negro Coke Ovens Department.

The steps taken independently or in concert by Bethlehem and Local 2601 from 1950 until 1968, as outlined above, have resulted in the denial to Negro employees of the Coke Ovens Department of employment opportunities equal to their white counterparts. These steps were an extension of the discriminatory practices admitted by Bethlehem and found as fact by this court. It is clear that they were undertaken with the intent to discriminate against Negroes. To the extent that the defendants have had to observe the results of these steps, their failure to take corrective action and the pervasive discrimination practiced by Bethlehem throughout the rest of the Plant give ample bases to infer such intent.

[4] All of these steps, independently and collectively, deprived and continue to deprive the Coke Ovens Negro employees of equal employment opportunities in violation of Title VII, 42 U.S.C. § 2000e et seq. Adequate relief for the Coke Ovens requires only that persons in the Coal Handling and Batteries Units, within the defined class as of the date of the court's order, should be offered the first opportunities to transfer to vacancies in the By-Products and Heating Units based upon their Coke Ovens Department seniority. These transferees would take the entry level job in those units if they should elect to transfer. The discrimination practiced in the past within the Coke Ovens Department requires that this relief be granted.

[5, 6] The findings of fact as outlined above have been reached by examining both the proof on trial and the stipulations filed with the court. Full consideration has been given to pre-Act conduct as revealed by the stipulations and the proof in spite of the protests of

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the defendant corporation. It seems to the court that consideration of pre-Act conduct serves to illuminate the purpose and effects of present policies, especially where policies which appear to be racially neutral are claimed to be part of a pattern or practice of racial discrimination. Moreover, where the Act is violated, racially neutral practices may be prohibited or changed because they build upon a foundation of pre-Act discrimination and tend to have present discriminatory effects. Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970); United States v. Sheet Metal Workers Int. Ass'n, Local U. 36, 416 F.2d 123 (8th Cir. 1969), reversing, 280 F.Supp. 719 (E.D. Mo.1968); United States v. Local 189, United Papermakers and Paperworkers, 301 F.Supp. 906 (E.D.La.1969), aff'd 416 F.2d 980 (5th Cir. 1969); United States by Clark v. H. K. Porter Co., 296 F.Supp. 40 (N.D.Ala.1968); Dobbins v. Local 212 Int. Bro. of Elec. Wkrs., 292 F.Supp. 413 (S.D.Ohio 1968); Vogler v. McCarty, Inc., 294 F.Supp. 368 (E.D.La. 1968), aff'd sub nom., Local 53 of Intern. Ass'n of Heat and Frost Insulation and Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969); Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D.Va. 1968). Post-Act conduct cannot be properly evaluated in a vacuum. A full understanding of the nature and import of post-Act conduct may only be reached after considering the circumstances in which it takes place. Additionally, allegations that there is a "pattern or practice of discrimination" would be difficult to prove without reference to the practices of the past. In short, the prior acts of the defendants regarding employment practices are relevant and material in determining whether present practices are illegal or tend to perpetuate past discriminatory practices.

[7] The Attorney General in this case has presented considerable statistical evidence in support of the allegations contained in the complaint. For example, certain statistics concern the percentage of Negroes in departments or units of the Bethlehem Plant on specific dates, and in some cases the statistics s... complete absence of Negroes in some d... partments of the plant. Statistical e... dence is, of course, subject to vario... inferences, susceptible to many inte... pretations, and must always be view... with caution and weighed with gr... care. Indeed, the disparate conclusi... which have been urged on this co... by the opposing parties, using the s... statistical raw material, demonstrate t... caution that must be used in drawi... factual conclusions from statistics. B... the difficulties inherent in the proc... should not render the use of such stati... tics improper. Probabilities guide m... in their everyday affairs. Evidence ... statistical probability may likewise b... considered by a finder of fact in det... mining the questions presented. Th... was recognized by the Eighth Circ... Court of Appeals in United States ... Sheet Metal Workers Int. Ass'n, Lo... U. 36, *supra*, where the court stat... "The Act, in our view, permits the u... of evidence of statistical probability ... infer the existence of a pattern or pra... tice of discrimination." 416 F.2d 12... 127 n. 7. This court is of the opin... that in some cases the statistics the... selves might raise such a compelling i... ference in the absence of any contra... explanation as to make out a prima fa... case of discriminatory patterns or pra... tices. This case, however, is not one ... them. The admissions contained in t... stipulations considered together with ... statistical evidence and the testimony ... trial comprise such overwhelming p... of discrimination that it warrants a... relief by decree of this court for ... stated by Circuit Judge Wisdom, "W... an employer adopts a system that ne... sarily carries forward the incidents ... discrimination into the present, his pra... tice constitutes on-going discrimina... unless the incidents are limited to th... that safety and efficiency requi... Local 189, United Papermakers & Pa... workers v. United States, 416 F.2d ... at 994 (5th Cir. 1969). The court i... noted that the Civil Rights Act "op... only prospectively," 416 F.2d ...

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...been emphasis on the pro-...ctive nature of the statute serves only to becloud the fact that seniority systems which perpetuate past discriminatory practices may be altered by decree when there has been a violation of the statute after its effective date. See, e. g., Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970); United States v. Sheet Metal Workers, *supra* (8th Cir. 1969); United States v. Local 189, *supra* (5th Cir. 1969); Local 53 v. Vogler (5th Cir. 1969); see also Quarles v. Philip Morris, Inc., *supra*.

[8-10] Here, the discriminatory practices were admitted and continued for over two years beyond the effective date of the Act. Under such circumstances, a court may alter by decree a seniority system which itself may be racially neutral on its face, even though the system developed without regard to racial considerations. Local 189 v. United States, *supra*. This is true irrespective of section 703(h) of Title VII, 42 U.S.C. § 2000e–2(h) which exempts as unlawful employment practice different conditions of employment pursuant to a bona fide seniority system which is "not the result of an intention to discriminate because of race." Intention may be inferred from conduct considering all the surrounding circumstances. It is not necessary to prove that an intention *to discriminate* existed at the time of the conduct. To prove intention all that need be demonstrated is that the conduct is not accidental, inadvertent or heedless, or arises from mistake. Local 189, United Papermakers & Paperworkers v. United States, *supra*, 416 F.2d at 986 n. 15, cf. Dobbins v. Local 212, *supra*, and United States by Clark v. H. K. Porter Co., 296 F.Supp. 40 at 115 (N.D.Ala.1968). Also "bona fide" as used in the statute should not be read as exempting from adjustment a seniority system based on discriminatory practices where the proof shows a violation of the Act after its effective date and the seniority system perpetuates the effects of the discrimination. Such a syste... is not bona fide. Local 189 v. Unite... States, *supra*, 416 F.2d at 988; Quarl... v. Philip Morris, Inc., *supra*, 279 F.Sup... at 517. Here, the record is replete wit... facts from which the intention of t... company can be inferred. The condu... of the union, including its failure to tak... steps to discourage company policy an... its acquiescence in an historical and tr... ditional discriminatory policy, belies th... contention that its participation in th... end result was accidental, inadvertent o... unintentional. This court cannot believ... that the union was unaware of a situa... tion which was perfectly obvious to ever... Negro at the Bethlehem Plant.

[11] Given this factual situation, ... is clear that this court is fully empowe... ed both by the statute itself (sectio... 707(a), 42 U.S.C. § 2000e–6(a) whic... authorizes the Attorney General to r... quest "such relief * * * as * * ... necessary to insure the full enjoyment ... the rights herein described") and b... traditional principles of equity, cf. Mitc... ell v. DeMario Jewelry, 361 U.S. 288 ... 291–292, 80 S.Ct. 332; 4 L.Ed.2d 3... (1960) and Porter v. Warner Co., 3... U.S. 395 at 398, 66 S.Ct. 1086, 90 L.E... 1332 (1956); see also United States b... Clark v. H. K. Porter, *supra*, 296 F.Sup... at 115, to fashion a decree which wi... correct the present effects of past di... crimination. Indeed, as stated by th... Fourth Circuit, "In formulating relie... from such practices the courts are n... limited to simply parroting the Act's pr... hibitions but are permitted, if not r... quired to 'order such affirmative actio... as may be appropriate.'" 407 F.2d 10... at 1052; 42 U.S.C. § 2000e–5(g). How... ever, in granting relief, the court mus... also anticipate collateral effects of a pr... posed decree to determine if such effec... would create inequities so as to re... der the proposed relief inappropriate u... der the particular facts of the case. Thi... court must now consider the relief r... quested by the Attorney General to d... termine if such relief should be grante... under all the facts and circumstance...

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COLLATERAL EFFECTS OF REQUESTED RELIEF

[12] The Attorney General asks this court to remedy the discriminatory assignment policy of Bethlehem Steel Corporation's Lackawanna Plant by allowing all Negroes (and only Negroes) employed in the eleven departments to transfer from those departments to other departments in the Plant with rate retention and without the loss of seniority privileges. While it may be true that this remedy would completely erase any vestige of past discrimination, the court is of the opinion that the remedy would be too drastic, would result in considerable inequities to the other plant employees, and would create an unwarranted preference for Negroes over whites in the eleven departments. While the proposal would certainly make transfer more attractive to employees than presently, the court believes that, among other things, the following inequities would result:

(1) The remedy benefits certain Negroes but not whites who are similarly situated. Although this court does not doubt its power in a proper case to provide a remedy exclusively for Negroes where they are the only members of the class discriminated against, the proof in this case indicates that Bethlehem Steel Company's discriminatory assignment policies related not alone to Negroes but also to ethnic minorities in general (Stip. 2, p. 3; Trial Transcript pp. 1144–1153, 1356, 1372–3 and 1585). Simply because the Attorney General has, for practical reasons, limited its case to Negroes, does not require the court to be so limited in providing relief. Indeed, to do so under these facts would be arbitrary, unfair and unwarranted under the evidence presented.

(2) Rate retention would result in different rates of pay for doing the same job. It would undermine the Job Classification Program in the industry and create broad exceptions to the "equal pay for equal work" doctrine which is the hallmark of the steel industry in this country. It is not improbable that em-

ployees receiving less ... the same work would demand that ... rate be upgraded similarly. Rate retention would also result in some instances in the transferees receiving higher pay than the supervisors for whom they work, with the attendant adverse effect on morale and production. Additionally, where incentive jobs are involved, the transferee, since he may already receive a higher rate of pay, would have little or no motivation to increase production. Where the incentive is computed on a group basis, the group would suffer from the lack of motivation of the transferee members resulting in damage to morale throughout the Plant. Finally, under the proposal, there is no provision which would prevent senior employees in the eleven departments, who now hold highly-paid jobs of responsibility, from transferring to less responsible positions in other departments while receiving the same rate of pay. Considering all the evidence, the court believes that any decree containing rate retention provisions, under the circumstances of this case, would result in inequities at least as objectionable as those the court is attempting to correct.

(3) The government's proposed seniority carryover remedy would seriously disrupt employees' existing promotional and demotional aspects by changing the relative seniority standings of employees and enabling transferees to displace existing employees from their jobs. Thus, employees who are blameless would pay the price for the company's violations. The government acknowledges that its seniority carryover remedy would have these effects.

Throughout the history of the steel industry, employees have advanced through their seniority units on the basis of their relative seniority within the department or unit. As promotional opportunities arise, the qualified employee with the greatest departmental or unit seniority is the one who is entitled to the promotion. Employees who transfer from another department begin accumulating departmental and unit seniority from the time they enter the

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...nt; their seniority accumulated in their former department does not count in determining their relative standing for promotional purposes. The same is true when a reduction in force occurs.

The departmental and unit seniority system developed out of a desire that employees at all times know where they stand in terms of their future prospects in the department in which they work, and to enable employees to make decisions relating to their future with knowledge of their relative standing. The government's proposed carryover remedy would alter the relative standings of employees in their units in the following ways:

(a) Although under the government's proposal employees would initially go to vacant jobs at the bottom of the seniority unit and their entry into the department would not be at the expense of employees already in that unit, once in the new unit, the transferee would be credited for all subsequent moves with his full plant-wide service. The effect of this process would be to disrupt what would have previously been the firm expectation of employees already in the unit who had less plant-wide seniority than those transferred into the department. The same disruption would occur in reverse during a reduction in force.

(b) Many employees, both white and Negro, have transferred without the seniority carryover and if the government's proposed remedy were utilized, these transferees would occupy a seniority status inferior to those who transfer under the court's decree.

(c) The government's remedy would be made available to a limited group of people at the expense of others who are equally or worse situated, including the whites in eleven departments and the whites and Negroes in departments inferior to the eleven departments.

(d) Much credible evidence was introduced during the trial which indicated that the Negro employees of Bethlehem Steel Corporation, Lackawanna Plant, do ...ire a special set of rights but ...

progress like everyone else in the Pla... As mentioned previously, the proof a... indicates that transferring will t... place without special incentives.

For all of the foregoing reasons, ... court concludes that the seniority car... over remedy sought by the governm... in this case would be arbitrary in ... application and effect, inequitable ... employees guilty of no wrong, and wo... have adverse effects wholly out of p... portion to the injustice which it seeks ... cure.

REMEDY

Consideration of all of the above c... lateral effects convinces this court t... the relief proposed by the governm... contains provisions inappropriate and ... equitable in curing a system which te... to lock Negroes and others into depa... ments to which they were discrimi... torily assigned. Moreover, the court ... lieves that any relief designed to cu... the present effects of discriminatory ... signment must apply to all employees ... the eleven departments irrespective ... race, since the proof indicates that t... discrimination was practiced again... ethnic minorities in general. As of O... tober 21, 1967, the proof indicates (G... Ex. 3) that there were 6227 employe... in the eleven departments, 2160 of wh... were Negroes. This court has found th... transfers occur even when unacco... panied by the collateral benefits of ra... retention and seniority carryover deem... necessary by the Attorney Gener... Transfer rights in order of Plant se... iority, available to all employees in t... eleven departments, without those ben... fits, will allow employees, who are tod... offended by the present effects of t... discriminatory practices, the opportuni... to avoid those effects. Because in e... ercising the option to transfer they w... incidentally suffer temporary economi... loss and must sacrifice accrued seniori... in their present job, does not make th... remedy ineffective. The choice will b... long to the employees irrespective ... race. If an individual deems it mo... advisable for him to stay where he ... rather than suffer economic and senio...

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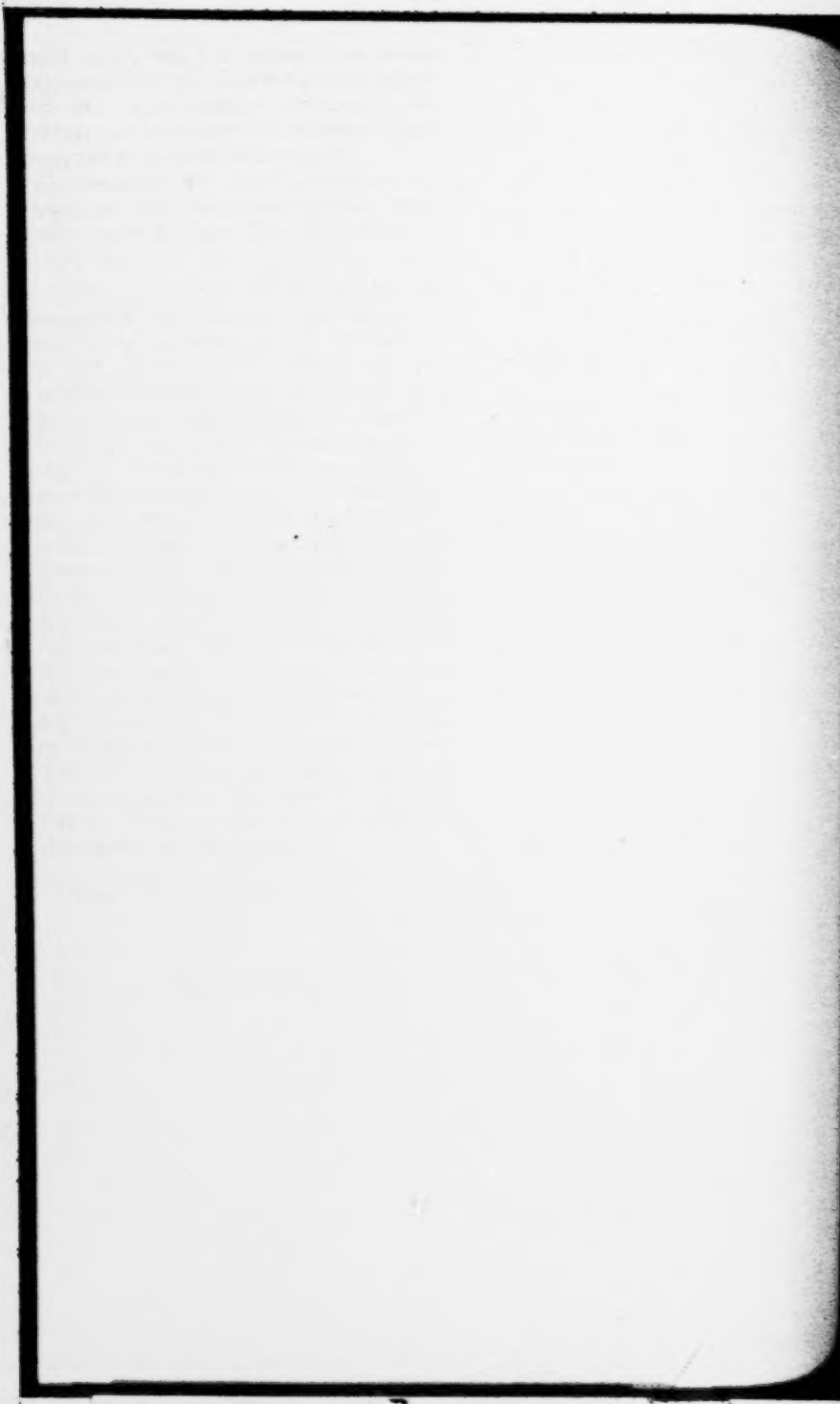
that he has not had a chance to change departments and avoid the present effect of the discriminatory practice. The things he will have to surrender have accrued to him without regard t[illegible]. All employees who elect to transfer will transfer under the same conditions without regard to race. The free choice is their own.

[13] The court will order that all employees, both Negroes and whites, in the eleven departments as of October 1, 1967, shall have the right to transfer to other departments on the basis of seniority without rate retention or seniority carryover. As detailed above, the court also will order the relief requested regarding the Coke Ovens Department 512 and apprentice program and believes such relief is appropriate to cure the present effects of past discrimination. In addition to strengthening the transfer rights already in existence in the plant, the court will order that the company and union effectuate a substantial reduction in the number of pools, a remedy which will offer dramatic prospects of broadening transfer opportunities. The court believes that these steps will prove adequate to alleviate the present impact of the company's past policy of discriminatory assignments.

Enter decree accordingly.



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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, by RAMSEY CLARK, Attorney General,

Plaintiff,

-against-

BETHLEHEM STEEL CORPORATION, a corporation, et al.,

Defendants.

CIVIL 1967-432

AMENDED DECREE

This action having been remanded to this Court by order and judgment of the United States Court of Appeals for the Second Circuit, dated June 21, 1971, for entry of a new decree in accordance with the opinion of that Court dated June 21, 1971, as amended by order of that Court dated August 27, 1971 and the mandate of the Court of Appeals having been filed in the Office of the Clerk of this Court on September 14, 1971,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That paragraphs 5(a) and 7 of the decree entered herein by this Court on April 13, 1970, is hereby amended to read as follows:

5. Bethlehem Steel shall adopt and implement the following program to correct the effects of its past racially discriminatory practices in hiring, assignment, transfer and promotion of Negro employees.

(a) (1) A list shall be prepared of Negro employees who, before October 1, 1967, were hired and initially assigned to the departments set out in paragraph 1 of this decree. This list shall include the date of employment, the department of original assignment, and the department of current assignment if different from the department of original assignment. By October 26, 1971, each such employee who has not previously transferred out of one of the eleven departments shall be offered in writing the opportunity to transfer and shall have made available to him during the next ninety (90) days, by Bethlehem, all necessary forms, explanations of procedures to be followed in effectuating such a transfer, the nature of information available and where it may be obtained. Bethlehem shall compile information concerning the departments other than those listed in paragraph 1, including average earnings in the job classifications, seniority lists and other available information pertaining to promotional opportunities and job security and shall keep such information readily available in the employment office for inspection by members of the affected class. In addition, the parties to this lawsuit shall designate representatives to form a Seniority and Tranafer Information Committee, which will be available at designated times to advise members of the affected class as to their rights and opportunities hereunder.

(2) Any employee seeking such a transfer must submit his request in writing within ninety (90) days after the offer. Each such employee will be given the opportunity to designate, on the forms provided by Bethlehem, the department or departments to which he wishes to transfer, provided none of such departments is among those listed in paragraph 1 of this decree. Employees requesting such transfers shall be transferred in accordance with their plant service dates to the first available permanent vacancy in any department they have designated, provided the transferring employee meets the qualifications or prerequisites for assignment required in that department. For the purpose of the preceding sentence an "available permanent vacancy" is a permanent vacancy which is not filled in accordance with normal seniority practices. If a vacancy occurs which proves to be a permanent vacancy, but was filled on a temporary vacancy basis, the employee entitled to transfer to said permanent vacancy pursuant to paragraph 5(a) of this decree shall be transferred to fill that vacancy. An employee who shall have requested a transfer may reject a transfer made available to him

to a department he has designated, but if he shall reject two such opportunities for transfer he shall not thereafter be entitled to the rights granted by paragraph 5(a) of this decree. In no case shall the qualifications or prerequisites for assignment, including testing, applied to the transferee be different or higher than those required of the least qualified person assigned to that department since January 1, 1964, nor shall any new hire or transferee under the provisions of the collective bargaining agreement be assigned to any department for which an application under this provision is pending unless no applicant is qualified for the vacancy to be filled or all of the applicants reject a transfer to such vacancy.

(3) In the event that two years after the date of this amended decree, Bethlehem has been unable to transfer an applicant to a department designated by him, he shall be given notice that he has an opportunity within thirty (30) days of his receipt of the notice to again designate a department or departments to which he wishes to transfer, under the terms and conditions of paragraph 5(a) of this decree, and unless he again designates a department or departments to which he wishes to transfer he shall not thereafter be entitled to the rights granted by paragraph 5(a) of this decree.

(4) To determine who is eligible for promotion, and for the purpose of demotions, or layoffs in connection with the decreasing of the working force and of the recalling to work of men so laid off, in accordance with the provisions of Article X, Section 1, of the 1968 Master Agreement or the corresponding provisions of a subsequent agreement, when an employee who has transferred pursuant to this decree is competing for a job, the continuous service to be used for all competing employees will be plant service date and no other, except that when workers in the transferee's unit in his new department are recalled after any layoff from the unit all employees shall return to the same positions relative to each other as they held immediately prior to their layoff, or, in the event of changes caused by promotion or attrition, to the positions which they would have had if there had been no layoff.

(5) Only workers qualified to fill a higher job may use plant service to advance. Except for the purpose of filling a lower-rated position at a time of force reduction or layoff in a unit, there will be no bumping of employees out of other jobs. Except as may be provided by a line of progression there will be no right to leapfrog over employees in intermediate jobs and compete for a higher job on the basis of plant service.

(6) Each employee transferring pursuant to this decree shall, for each pay period, be paid (i) at the rate equal to the standard hourly wage rate nearest to his average hourly earnings in the department from which he transferred, exclusive of incentive pay, shift differentials and Sunday and overtime premiums, for the 13 weeks or 7 bi-weekly pay periods prior to his date of transfer (his red-circle rate), plus the incentive pay (calculated at the incentive calculation rate for his red-circle rate), shift differentials and Sunday and overtime premiums earned on his new job, or (ii) his average hourly earnings at the established rate for his new job, including the incentive pay, shift differentials and Sunday and overtime premiums earned on such new job, whichever is higher. If there shall be a general wage increase within nine (9) months after his date of transfer, his red-circle rate shall be increased by the amount of the general wage increase. When a transferee's average hourly earnings exclusive of incentive pay, shift differentials and Sunday and overtime premiums in his new department over a 13-week period or 7 bi-weekly pay periods equal or exceed his red-circle rate as defined above, his red-circle rate shall cease and he shall thereafter be paid at the rate of the job he is working. In no event shall a red-circle rate exceed the standard hourly wage rate for job class II at the date of this decree. If no job in a transferee's new department has a standard hourly wage rate as high as the transferee's red-circle rate as above defined, then his red-circle rate shall be the standard hourly wage rate of the highest job in his new department. A transferee who, after having been in his new department for thirty (30) days, fails to take an opportunity for, or refuses, a promotion or who fails twice to qualify for promotion to an available higher job, shall lose the rate retention rights granted in this paragraph and shall thereafter be paid at the rate of the job he is working. For the purposes of the preceding sentence, (1) a transferee who fails to take an opportunity for promotion within thirty (30) days of his last preceding promotion shall not lose thereby his rate retention rights granted by this paragraph; and (2) two or more failures to qualify within one thirty (30) day period shall count as only one failure. An employee who within one year following a transfer twice fails to qualify for promotion and thereby loses his rate retention rights as granted in this paragraph shall have the option, within thirty (30) days thereafter, to return to his former department without loss of seniority. Pending transfer under this decree, the appli-

cant for transfer shall lose no rights or privileges in his current department.

(7) In the event that any person transferred under the provisions of this decree shall be unable, within thirty (30) days after transfer to perform the duties of the new employment to which he is transferred, or requests to be returned to his former department, and returns to his former department under the provisions of the existing union contract, he shall be allowed to do so and to transfer under the provisions of this decree to one additional department with the seniority and rate retention rights provided for herein. Except as specifically provided in the preceding sentence, a transferee's right to transfer with the seniority and rate retention rights provided for herein may be exercised only once. The reasons for any return to his former department shall be documented in writing and retained on file by Bethlehem.

(8) Those Negro employees hired initially into one of the eleven departments set out in paragraph 1 of this decree prior to October 1, 1967, who have previously transferred to a department other than one of those eleven departments or to a unit of the Coke Ovens Department, 512, other than Batteries or Coal Handling pursuant to the right of transfer provided by Article X, Sections 8(g) and 8(h) of the 1962 Master Agreement or Article X, Sections 12(a) or 12(b) of the 1965 or 1968 Master Agreements and who are now in such new departments or in such seniority units will be accorded the same relief in their present department, or in their present unit in the Coke Ovens Department, with respect to rate retention and seniority, as will employees who may elect to transfer pursuant to this decree.

(9) Those Negro employees in the above defined class who are employed in the Batteries and Coal Handling Units of Coke Ovens Department, 512, shall have the additional option of electing to transfer under the above provisions of this decree from one of those two units in which he is working to the By-Product or Heating Unit of that department. Any employee who was employed as a bricklayer laborer in Department 404 and who has transferred to the bricklayer unit of Department 404 since January 1, 1968 shall be accorded the same relief with respect to rate retention and seniority in his present unit as employees who may elect to transfer pursuant to this decree. Such persons who are on layoff at the time of the entry of this decree shall be entitled to be recalled as force increases require on the basis of their plant seniority. Those Negro employees in the above defined class who are still employed as bricklayer laborers in Department 404 shall, when qualified, have the additional option of electing to transfer under the above provisions of this decree to the bricklayer unit of Department 404. With these exceptions, no special provision for transfer of members of the defined class is made for transfer within, between, or into the eleven departments named above.

(10) Each Negro employee who exercised the right of transfer pursuant to paragraph 5(a) of the decree as entered by the district court on April 13, 1970, and who is in his new department or in a new unit in the Coke Ovens Department, 512, as of the date of this decree shall be entitled in his new department or new unit in the Coke Ovens Department to the use of plant seniority for all purposes described in subparagraph (4) of this paragraph 5(a), and he shall, for each pay period, be paid (i) at a rate equal to the current standard hourly wage rate paid the job class nearest to his average hourly earnings, exclusive of incentive pay, shift differentials and Sunday and overtime premiums, for the 13 weeks or 7 bi-weekly pay periods prior to his date of transfer (his red-circle rate), plus the incentive pay (calculated at the incentive calculation rate for his red-circle rate), shift differentials and Sunday and overtime premiums earned on his new job, or (ii) his average hourly earnings at the established rate for his new job including the incentive pay, shift differentials and Sunday and overtime premiums earned on such new job, whichever is higher. His right to retain his red-circle rate as above defined shall be subject to the same terms and conditions described above with respect to employees transferring pursuant to this decree.

(11) Those white employees who exercised the right to transfer pursuant to the decree entered by this Court on April 13, 1970, shall retain the rights therein decreed. They shall not, however, be entitled to any additional benefits provided by this amended decree.

7. Each Negro applicant for the apprenticeship program within the period January 1, 1964, October 1, 1967, who had not as of April 13, 1970, been hired as an apprentice but who met the standards actually applied to the least qualified white applicant who was accepted during that period and who responded affirmatively to the offer made to him by Bethlehem pursuant to the decree of April 13, 1970, shall be offered apprentice opportunities in the order of the original application date—earliest date first.

2. That paragraph 13 of said decree is hereby amended to delete the second and third sa graphs thereof and substitute the following paragraph 13A.

13A. By October 26, 1971, Bethlehem shall furnish to the plaintiff a list of all employ the affected class showing each employee's plant service date and present departmental assig separately for those members of the affected class who presently are assigned to one of the departments enumerated in paragraph 1 and for those who were initially assigned to one of departments but who have since transferred to other departments. Bethlehem shall then furnish the following information to the plaintiff:

(a) Within 30 days of October 26, 1971, a report showing the red-circle rate and a standard hourly wage rate at which he worked for the week ending October 30, 1971, or layoff during that week for the last full week worked, for each member of the affected who is presently assigned to a department other than one of the departments enumera paragraph 1;

(b) Within 100 days of October 26, a report for each department for which an a tion or applications for transfer has been made under this decree listing, in order of service date, the members of the affected class who made application for transfer to showing the present departmental assignment of each;

(c) Within 15 days of the end of each calendar quarter beginning with the fourth q of 1971, a report showing (1) all members of the affected class who were offered tra during the preceding quarter, indicating the disposition made of each such offer, (2) the circle rate and the average standard hourly wage rate at which he worked during the ceding quarter of each member of the class who during any part of the preceding quarte paid on a red-circle rate basis; and (3) any change during the preceding quarter in red status, with the reason therefor, of each such member of the affected class;

(d) A copy of the notice given each transferee upon his transfer under this decree explains his rights under the decree;

(e) Within 10 days after any member of the affected class loses his red-circle rate f reason other than the fact that the average standard hourly wage rate at which he wo his new job has exceeded his red-circle rate for a thirteen-week period, a report giv name of the person affected and the reason for the loss of his red-circle rate;

(f) A copy of any letter sent to a member of the affected class who has lost his red rate because he twice failed to qualify for promotion within one year of his transfer, not him that he may return to the department from which he transferred without loss of se

(g) Within 10 days after any transferee returns to his former department, having in his new department 30 days or fewer, a report giving the name of such person a reason for his return to his former department;

(h) A list of all persons who have been offered apprenticeships and placed in the ticeship program pursuant to paragraph 7;

(i) By November 22, 1971, a report showing the total initial hires, by race, for each ment for the period October 1, 1967—September 27, 1971, and the total number of em by race for each department as of September 27, 1971, and quarterly thereafter com with the fourth quarter of 1971 a report showing all initial hires and terminations, by for each department during the preceding quarter and the total number of employees, by for each department as of the Monday nearest to the last day of the preceding quarte

(j) By October 26, 1973, a list of all members of the affected class who made appl for transfer under the provisions of the decree but who have not then been transferred

3. That in all other respects the decree entered herein by this Court on April 13, 197 remain in full force and effect.

Dated: October 14, 1971

JOHN O. HENDERSON
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, by RAMSEY CLARK, Attorney General,

Plaintiff

-vs-

CIVIL 1967-432

BETHLEHEM STEEL CORPORATION, a corporation, et al.,

DECREE

Defendants

This matter having been tried before this court, and the parties having filed extensive stipulations of fact, which have been found as facts by the court, and extensive briefs having been filed by all parties, and upon full consideration of the facts, and the law, the court being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

That the defendant Bethlehem and defendants United Steel Workers and affiliated locals, their agents, officers, employees, and all persons acting in concert or participation with them, be and they hereby are permanently enjoined from engaging in any act or practice at defendant Bethlehem's Lackawanna plant for the purpose or with the effect of discriminating against any individual because of his race or color.

That the defendant Bethlehem in concert with the defendant unions take the following steps at its

Lackawanna plant:

1. Bethlehem Steel shall hire applicants for permanent or temporary employment and shall recall, assign, transfer and promote employees without discrimination on the basis of race or color. Bethlehem shall not follow a practice of assigning Negro applicants for plant employment on account of their race, to departments 404 (Brickmason Labor), 406 (Yard), 503 (Sintering Plant), 512 (Coke Ovens), 520 (Blast Furnaces), 530 (Steelmaking), 612 (44"-32" Mills), 620 (Billet Yard), 631 (12"-10"-8" Bar Mills), 660 (28" Mill) and 662 (14" Mill).

2. Bethlehem Steel shall implement an employment procedure which will insure that all applicants and employees are processed, hired, recalled, assigned, transferred, or refused employment, without discrimination on the basis of race or color. Employment procedures shall include at least the following provisions:

(a) Each applicant for employment shall be afforded the opportunity to fill out an application blank. He shall then be considered for any available job open to new hires.

(b) Each applicant for employment shall be informed at the time of his application for employment of all

available job openings for new hires and the full procedure for applying for all such job openings.

(c) Any employment test used as a screening device for plant employment and the electrical and mechanical tests shall be used only after full validation by an expert in testing who shall be appointed, compensated, and retained by Bethlehem Steel for the purpose of validating such tests, against the requirements for performance of the various jobs available and the multiracial character of the potential employee source. Pending such study, the currently-utilized Differential Aptitude Test and the electrical and mechanical tests may be continued in use, subject to the provisions of this decree, provided such study is to be completed within 90 days of the date of this decree. The maximum passing score during this period shall not exceed 70 for the Differential Aptitude Test, 65 for the mechanical test and 200 for the electrical test.

The plaintiff shall have the right to review and copy all materials used in the validation studies and shall be furnished a copy of the report of the validation studies and thereafter may apply to this court for further relief if necessary.

(d) No new employee shall be rejected or refused by any supervisor in the department for which he has been hired by the employment office. New employees may be returned to the employment office only if their on-the-job performance is judged inadequate and the reasons for such return documented in writing and retained on file in the employment office.

3. Bethlehem Steel shall give no unlawful preference to any applicants for employment or employees on the basis of relationship to persons presently employed, either as to employment, recall, assignment, transfer, or promotion.

4. Bethlehem Steel shall implement a program of recruitment designed to afford equal opportunity for employment. Whenever the plant is hiring, notice of Bethlehem's equal employment opportunity shall be

advertised, in the local media, in a manner calculated to reach Negroes, at least once each month for one year from the date of this decree. Regular contacts shall be maintained with Negro recruitment sources including, but not limited to, schools which have a substantial number of Negro students and organizations which are involved in Negro job placement. On a regular basis, at least once per month, such organizations shall be advised of available job openings. Consideration should be given to placing an employment office in the major Negro population area.

5. Bethlehem Steel shall adopt and implement a program to correct the effects of its past racially discriminatory practices in hiring, assignment, transfer and promotion of employees. This program, which shall be submitted in writing to the court and the plaintiff within ten (10) days, shall include at least the following:

(a) A list shall be prepared of employees in the departments set out in paragraph 1 of this decree who were hired before October 1, 1967. This list shall include the date of employment, the department of assignment, and the job classification in which the employee

is presently serving. Within thirty (30) days of this decree, each such employee shall be offered in writing the opportunity to transfer and shall be supplied by Bethlehem with all necessary forms and explanations of procedures to be followed in effectuating such a transfer. Any employee seeking such a transfer must submit his request in writing within sixty (60) days after the offer. Each employee will be given the choice of transferring to one of the following job areas: (a) electrical; (b) mechanical; (c) mill; and (d) other (except the eleven departments set out above). Any employee electing to exercise this option to transfer shall be transferred to the first available job in any of the departments in the area of his choice, provided that a vacancy exists pursuant to normal seniority practices in that department and the employee meets the qualifications or prerequisites for assignment required in that department. In no case shall the qualifications or prerequisites for assignment, including

testing, applied to the transferee be different or higher than those required of the least qualified person assigned to that department since January 1, 1964, nor shall any new hire or transferee under the provisions of the collective bargaining agreement be assigned to any department for which an application under this provision is pending. In the event that Bethlehem is unable, within two years of the date of this decree, to transfer any applicant to the area of his choice, he shall be given the opportunity to request a new area, under the same terms and conditions.

Employees requesting transfer pursuant to this paragraph shall be transferred in accordance with their plant seniority, except that those employees of this class who have previously applied for Mechanical or Electrical Division jobs shall upon application be given first priority in transferring to those areas in accord with their date of application to those divisions.

Each employee transferring shall be

paid at the current rate of the job into which he transfers. Pending transfer, the employee shall lose no rights or privileges in his current department.

In the event that any person transferred under the provisions of this decree shall be unable, within thirty (30) days after transfer to perform the duties of the new employment to which he is transferred and returns to his former department under the provisions of the existing union contract, the reasons for any such return shall be documented in writing and retained on file by the employment office.

Those employees in the above defined class, who are employed in the Batteries and Coal Handling Units of Coke Ovens, Department 512, shall have the additional option of electing to transfer under the above provisions of this decree, subject to the same conditions, between either of the two units named and the By-Product and Heating Units of that department. With this exception, no special provision for transfer of members of the

defined class is made for transfer between and among the eleven departments named above.

(b) Bethlehem Steel shall, within sixty (60) days of the date of this decree, determine the potential for assignment to supervisory positions of (1) all non-supervisory employees in each department who have been employed for at least five years and (2) of each non-supervisory employee whose department length of service is equal to or greater than that of any hourly-paid employee who has worked as a supervisor 50 percent or more of his time in that department during the last year. Thereafter, lists of all such employees, identified by department, who have supervisory potential shall be prepared reflecting an order of precedence for promotion of such employees to supervisory positions and all promotions to available first line supervisory positions shall be made from such lists except that Bethlehem Steel shall, in Department 404, offer to Samuel Briggs, Charles Kerr, Fulton Taylor,

and John Maglic and, in Department 512, offer to Samuel R. Hemphill, the opportunity for reinstatement in the supervisory positions from which they were demoted in 1967. No person shall be promoted to supervisory positions in Department 404 (Labor) before each of the above four men has been reinstated or has refused an offer of reinstatement. Within six months of the date of this decree, the plant will establish qualifications for and responsibilities of each supervisory position through the level of general foreman or equivalent and shall report to the plaintiff in writing the criteria established. The qualifications of each salaried supervisor selected during the three years preceding the date of this decree and of each non-supervisory employee previously listed as having supervisory potential pursuant to this paragraph shall be compared to the criteria thus established and such comparisons shall be reported to the plaintiff in writing. Promptly thereafter, and semi-annually for a

period of five years, the lists shall be reviewed and revised in accordance with such qualifications, and all promotions available to first line supervisory positions shall be made from such lists. In applying the provisions of this paragraph, the plant shall not be precluded from assigning on a nonracial basis to such supervisory positions employees employed in management training programs (e.g., the Loop Course and the Technical Trainee Program).

(c) All non-supervisory production and maintenance job openings not filled by established seniority processes shall be posted regularly in a place or places accessible to all present employees.

6. Bethlehem Steel shall within ten (10) days notify in writing and by conspicuous postings in the plant, all non-craft employees of the standards for admission to the apprenticeship program, the apprenticeships for which programs exist, and the time required to complete each program. Such employees shall be notified of all subsequent changes in admission requirements or in the number of apprenticeship programs offered. No requirements other than those announced shall be applied

for the purpose of selecting apprentices. All openings in the apprenticeship program shall be posted in conspicuous places throughout the plant. Each applicant for employment shall be given complete information about the availability of apprenticeships and the requirements for admission to them.

Those provisions of Appendix 10 of the August 1, 1968 Master Agreement between Bethlehem and the Union, pertaining to the manner of selection of apprentices for the Plant Apprenticeship Program shall be suspended for a period of five years from the date of this decree for all apprenticeship selection except those from Bricklayer Department 404. In lieu of those selection procedures defined in Appendix 10 to the August 1, 1968 Master Agreement, selection of apprentices for all crafts other than Bricklayer Department 404 shall be made by Bethlehem, under the general provisions of this decree.

7. Each applicant for the apprenticeship program within the period January 1, 1964 to October 1, 1967, who has not as of the date of this decree been hired as an apprentice but who met the standards actually applied to the least qualified white applicant who was accepted during that period shall be offered the opportunity to enter the apprenticeship program without further testing or other screening. Bethlehem Steel shall examine its records to determine the identity of all such applicants

and shall take appropriate steps and make reasonable efforts to notify such post-applicants and offer them apprentice opportunities in the order of the original application date -- earliest date first.

8. The Electronic Repair Training Program shall not be restricted either to employees of Department 444 or to employees of the Electrical Division. Within thirty (30) days of the date of this decree, Bethlehem Steel shall institute objective standards for the admission of electronic repair trainees and shall notify in writing all non-craft employees of the standards.

9. Within ten (10) days of the date of this decree, Bethlehem Steel shall post notices in all areas of the plant where employees of the Department 404 Labor Unit work and notify in writing all employees of the Department 404 Labor Unit of the requirements for admission into the Bricklayer apprenticeship program and of the availability of the Brickmason Craft Determination Test for entry into the craft. The notice shall request all 404 laborers who have not taken the Craft Determination Test and who desire to take such test to submit their names within thirty (30) days on a form to be provided by the defendant, which shall take immediate steps to schedule within thirty (30) days thereafter craft tests on company time for each person whose name appears on the list. All persons who equal or exceed the minimum

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proficiency level deemed satisfactory in the past shall be placed on the "passed test" list. Those who pass the test shall on the basis of plant seniority be assigned to the craft unit as openings occur. No new hires into the craft shall be effected until all persons on the "passed test" list have been assigned to the craft unit or, having been offered assignment, declined the position. No openings in the craft shall be filled from the Bricklayer Apprenticeship program other than apprentices in the program at the date of entry of this decree and those hired as bricklayer apprentices pursuant to paragraph 7 above, prior to the assignment or offer of assignment of all persons on the "passed test" list.

10. Bethlehem Steel shall make available on-the-job and formal training to those Negroes electing to transfer, or enter the apprenticeship programs, pursuant to the provisions of this decree.

11. No Bethlehem Steel employee who has furnished information or participated in any respect in the investigation of the company's employment practices shall be discriminated or retaliated against in any manner because of the furnishing of such information or of such participation.

12. Bethlehem Steel and the defendant unions shall meet promptly to renegotiate the pool agreements

so as to reduce the number of pools to the minimum consistent with the orderly operation of the plant. Within sixty (60) days of the date of this decree, they shall submit to the court a plan for reduction of the number of pools (or, if they are in disagreement, a detailed statement of their respective views) and simultaneously therewith serve a copy upon the plaintiff. The plaintiff will have thirty (30) days thereafter to submit its views to the court, following which, in the event of disagreement, the court will rule upon the matter.

13. Bethlehem Steel shall file with the court and serve on the plaintiff within ninety (90) days of the date of this decree and every ninety (90) days thereafter for a period of three years a report showing for the period covered the following:

(a) All terminations or rejections by supervisory personnel of Negro employees during their probationary period.

(b) The recruitment efforts pursuant to paragraph 4, including a copy of printed matter distributed.

(c) The action with respect to previously rejected Negro applicants to the apprenticeship program taken pursuant to paragraph 7.

(d) The action relating to Department 404 pursuant to paragraph 9.

(c) The disposition of all employee bids, including the race of the bidder, pertaining to Department 512 pursuant to paragraph 5(a).

Ninety (90) days from the date of this decree Bethlehem Steel shall furnish to the plaintiff a list of all Negro employees of the defined class as of the date of this decree. This list shall be arranged by the employee's department on the date of this decree and seniority within that department. The list shall show which of these Negro employees elected to transfer to other departments, pursuant to paragraph 5(a); those persons whose transfer has been completed, together with their present rate of pay and department. Every thirty (30) days thereafter, until all Negroes of the defined class who have elected to transfer pursuant to paragraph 5(a) have been transferred, Bethlehem Steel shall furnish the same information about all Negro transfers.

Bethlehem Steel further shall furnish to the plaintiff within ninety (90) days of the date of this decree:

(a) The promotional list, provided for in paragraph 5(b), showing the new order for promotion in each department and the race of each employee on the list;

(b) A list of all persons who have been offered apprenticeships and placed in the apprenticeship program pursuant to paragraph 7; and

(c) A list of all applicants since the date of this decree, by race and date of application, indicating which applicants were hired and their initial assignment and which applicants were rejected and the reasons for rejection. A similar list of applicants shall be filed each ninety days for the first year from the date of this decree and semi-annually for the next two years.

Bethlehem Steel shall furnish to the plaintiff a copy of all apprenticeship announcements made pursuant to paragraph 6 and a copy of the standards established for the Electronic Repair Training Program pursuant to paragraph 8.

14. Bethlehem Steel shall make available to the plaintiff at any and all reasonable times all records used as the bases for the reports and lists required by this decree and such other records as are maintained in connection with the hiring, rejection, assignment, transfer, promotion, and training of employees or applicants

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for employments.

15. Copies of the decree shall be posted in places accessible to all employees for a period of ninety (90) days from the date of its entry, including at least one copy in each department and in each welfare unit of the plant. A copy shall be retained in the Employment Office and shall be made available on request to any employee for his inspection.

16. The court retains jurisdiction of this action for such additional and supplemental relief as may be required.

JOHN O. HENDERSON
United States District Judge

DATED: April 13, 1970.

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the fourth day of December, one thousand nine hundred and seventy-two.

Present:

HON. WALTER R. MANSFIELD,
HON. JAMES L. OAKES,
HON. WILLIAM H. TIMBERS,

Circuit Judges

72-1420

—o—

GEORGE H. WILLIAMSON, JR., et al.,

v.

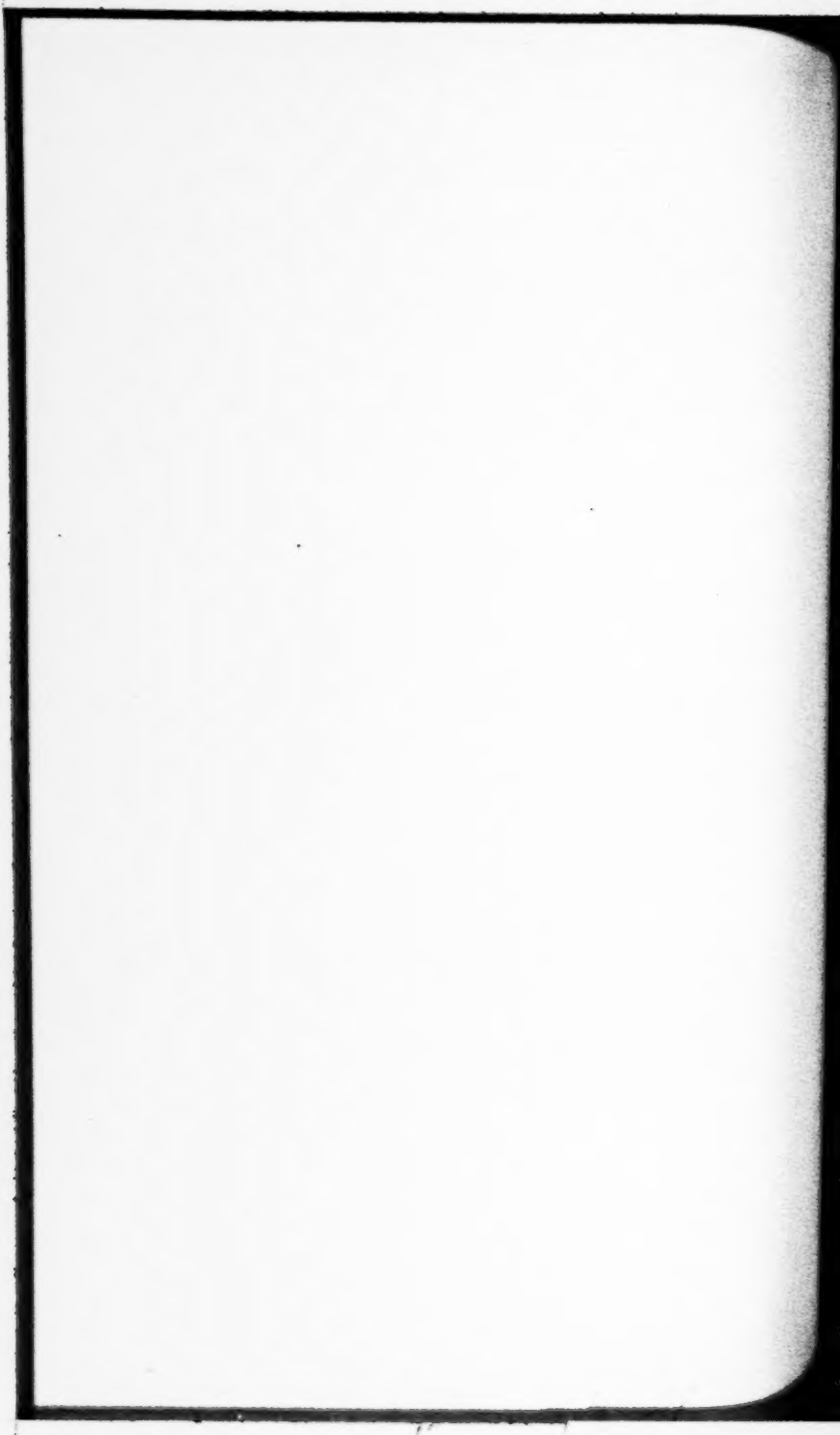
BETHLEHEM STEEL CORPORATION, a corporation; LOCAL 2601, UNITED STEELWORKERS OF AMERICA; et al.

—o—

A petition for a rehearing having been filed herein by counsel for the appellee, Bethlehem Steel Corporation, upon consideration thereof, it is

ORDERED that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
Clerk



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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 1004

BETHLEHEM STEEL CORPORATION,
Petitioner,

vs.

GEORGE H. WILLIAMSON, JR., TIMOTHY SMITH, JAMES B. LINDSAY, EDWARD GREEN, JR., WILLIAM A. CLARK, and VELVET BROWN, JR.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Bethlehem Steel Corporation has filed a petition for a writ of certiorari with this Court seeking to overturn a decision of the Court of Appeals for the Second Circuit in which the appellate court held that private citizens filing suit under Section 706 of Title VII of the Civil Rights Act of 1964 are entitled to seek and obtain fair and adequate relief from racially discriminatory employment practices. Inasmuch as the existence of the

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unlawful practices and their discriminatory consequences are not disputed, the sole reason offered by Bethelehem for denying these employees the ordinary protection of the law is that prior to the instant litigation the Attorney General acting under the provisions of Section 707 of Title VII sought and obtained limited relief with respect to certain discriminatory employment practices other than those which are currently depriving Respondents and the class they represent of equal employment opportunity. Respondents respectfully urge the Court to deny the petition for the following reasons:

(1) Because the decision of the Court below—that private parties are not deprived of their right to be free from racial discrimination in employment because the Attorney General in prior litigation against their employer (to which they were not a party) did not seek relief against the practices which are currently victimizing them—is clearly correct as a matter of law and policy;

(2) Because the issues raised by petitioner are so insubstantial and so peculiar to the instant case as not to merit Supreme Court review; and

(3) Because review of this case in an interlocutory stage is not warranted.

Indeed, when the correctness of the decision below, the insubstantiality of petitioner's arguments, and the inappropriateness of this case for Supreme Court review are considered, we believe that the true purpose of this petition becomes clear: petitioner, which obtained a stay of the mandate of the court below pending decision of this petition, seeks to delay, as long as possible, the day when it will be forced to cease its discriminatory policies and obey the laws against racial discrimination in employment.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 468 F.2d 1201 (2d Cir. 1972) and the opinion of the District Court is reported in 5 FEP Cases 202 (W.D. N.Y. 1972). These opinions, as well as the opinions of the district court and the Court of Appeals in *United States* v. *Bethlehem Steel Corporation*, are accurately reproduced in the appendix to the petition.

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Where pursuant to Section 707 of Title VII of the Civil Rights Act of 1964 the Attorney General of the United States brings a suit with limited objectives, seeking and obtaining limited relief, but leaving other serious unlawful employment practices intact, does the discriminator, Bethlehem Steel Corporation, thereby obtain an unassailable license to continue to engage in those unlawful practices with respect to which the Attorney General neither sought nor obtained relief.

COUNTERSTATEMENT OF THE CASE

The petition for certiorari seeks review of an order of the Court of Appeals remanding this case to the district court for a hearing in order to fashion "full, fair, just and adequate relief" (slip opinion at 327) from the discriminatory system of recall from layoff. Nowhere in its petition does Bethlehem deny that its system of recall from layoff operates to discriminate against blacks; rather it seeks to assert that because of prior litigation by the Department of Justice—to which respondents and the class they represent were not a party—the Company has obtained an irrevocable license to continue these discrim-

inatory practices. In order to fully appreciate the nature of Bethlehem's position in this case, a brief review of the prior litigation in both *United States* v. *Bethlehem* and the instant case is necessary.

1. United States v. Bethlehem Steel Corporation

In December of 1967, the Attorney General brought suit pursuant to Section 707 of the Civil Rights Act of 1964 (42 U.S.C. §2000e-6) alleging that Bethlehem Steel discriminated against blacks by assigning them to the hottest, dirtiest, and lowest paying jobs in the plant and challenging the transfer provisions of its collective bargaining agreement on the grounds that these provisions locked black employees into the discriminatory assignments. As petitioner concedes on page 8 of its petition, no allegation was made in the Government complaint that the system of recall was discriminatory.

Shortly after the litigation was commenced, Bethlehem Steel entered into a stipulation with the Government admitting that Bethlehem had assigned blacks to the worst jobs (in part because Bethlehem officials believed that blacks could stand the heat better); that Bethlehem officials had deliberately raised the test scores of white job applicants to give them priority over blacks; and that generally the Company had followed a practice of excluding blacks from all but eleven of the plant's eighty-two departments.

Prior to the suit, the Company agreed to stop assigning job applicants on the basis of race, to stop falsifying test scores, and *in the future* to cease the other discriminatory assignment practices which it had used to effectively segregate its plant. It refused, however, to provide relief to the victims of its past practices and indeed disputed the Government's contention that the transfer system which in operation required employees to forfeit their

competitive seniority and rate of pay if they transferred was unlawful. The impact of Bethlehem's position was to place a penalty on incumbent black workers who had been assigned to the eleven least desirable, lowest paying departments, should these workers desire to transfer. Thus, these workers were frozen into the discriminatory assignment patterns of the past. The Government, accordingly, sought in the district court a remedy which would permit black employees originally assigned because of their race to transfer to the departments which had been closed to them in the past, and allowed the employee to retain his plant seniority (years of plant service) and rate of pay when he transferred. Although the district court found that the transfer system did have the effect of locking blacks into the departments to which they were discriminatorily assigned, it declined to grant the relief because of a variety of "collateral effects" of the Government's requested relief.[1]

The Government appealed from the failure of the district court to grant the seniority carryover and rate retention remedies it had requested. On appeal, the Court of Appeals for the Second Circuit reversed the District Court's failure to grant this relief holding that the transfer provisions of the collective bargaining agreement had the present effect of discriminating against blacks by locking them into discriminatory assignments and that "the business necessity doctrine does not require denial of the proposed relief." *United States* v. *Bethlehem Steel Corporation*, 446 F.2d 652, 664 (2d Cir. 1971). Accordingly,

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1. These "collateral effects" included the fact (1) that the remedy was afforded only to blacks who had been discriminatorily assigned to a department and not to other ethnic minorities; (2) that rate retention would result in differing rates of pay for doing the same job; and (3) seniority carryover would disrupt existing seniority expectations of white workers. *United States* v. *Bethlehem Steel Corp.*, 312 F.Supp. 977, 994-95 (W.D. N.Y. 1970). The effect of the remedy on the system of recall from layoff was nowhere mentioned.

the Court of Appeals ordered that the relief requested by the Government be implemented. In accordance with "the carefully limited order *suggested by the Government*," these transfer rights were restricted to "*vacancies occurring in the normal course of business, i.e., vacancies caused by the death, retirement or transfer of an incumbent or by creation of a new job.*" id. at 663, 664 (emphasis added). And, "*as the Government suggests,* as workers are recalled following a layoff, all employees should assume the same positions relative to each other as they held immediately prior to layoff." id. at 664 (emphasis added).

Thus, the Court of Appeals ordered precisely the remedy requested by the Government.

2. The Instant Case

At about the same time that the Attorney General filed complaint Bethlehem entered a period of declining demand for employees. Substantial layoffs of long duration occurred affecting 50% of Bethlehem's workforce.[2] In mid-1971, however, a rising demand resulted in employees being recalled from layoff. Accordingly, the black workers of Bethlehem, frustrated by the failure of years of Government litigation to bring about any meaningful changes in their situation, brought the instant suit. They also sought preliminary relief respecting the recall from layoff system being used by Bethlehem and the unions.

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2. The impact of this economic fact on the Attorney General's decision to limit transfer rights to permanent vacancies was to deny the black workers of a meaningful remedy. The likelihood of a vacancy arising due to death, retirement or transfer when such a large portion of the workforce was on layoff was extremely low, since *all* laid off workers would have to be recalled before such a vacancy would exist. Thus, years of litigation netted the black worker virtually nothing in terms of improved opportunity. Moreover, Bethlehem's force reduction may itself be "permanent" thereby effectively foreclosing any meaningful right of transfer in the future, locking about 1400 black employees into the dirty, hot, low paying jobs they were originally assigned because black skin can "stand the heat better."

For the Company and the unions were unswerving in their determination to keep blacks in black jobs and whites in white jobs and were, therefore, returning workers from layoff based on their *departmental assignment at the time of layoff*. In short, in 1971 the Company and the unions were engaged in re-segregating the plant. The relief sought by plaintiffs was simple and fair requesting only that persons on layoff be returned from layoff to entry level and labor pool jobs which they were qualified to perform on a non-discriminatory basis.

The jurisdiction of the court was invoked pursuant to Section 706 of Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1866 (42 U.S.C. §1981). The legal basis for relief asserted by plaintiffs—that it is unlawful to perpetuate in the present the effects of past discrimination—is one that is now universally accepted. *Griggs* v. *Duke Power Co.*, 404 U.S. 424 (1971); *U. S.* v. *Jacksonville Terminal*, 451 F.2d 418 (5th Cir. 1971); *U. S.* v. *Bethlehem Steel Corp.*, 446 F.2d 452 (2d Cir. 1971); *Local 189, UPP* v. *United States*, 416 F.2d 980 (5th Cir. 1969). That a system of recall from layoff which preserves discriminatory assignments is unlawful was specifically held by the court below and by the Fifth Circuit. *Williamson* v. *Bethlehem Steel Corp.*, slip opinion at 326; *United States* v. *Hayes International Corp.*, 456 F.2d 112, 118-19 (5th Cir. 1972). In its petition for certiorari, Bethlehem does not challenge the soundness of legal basis on which plaintiffs rest their claim. Nor does Bethlehem dispute in its petition that its system of recall from layoff does, in fact, return black workers to the same hot, dirty and low paying jobs to which the company discriminatorily assigned them. Indeed, Bethlehem cannot dispute this fact, for the recall system is designed to do just that.

Since the requisite factual bases for a finding of past discrimination coupled with present discriminatory effect

are not disputed, and the legal principle requiring relief from such discrimination is well established, it is clear that Bethlehem has nothing to bring to this Court. But determined to continue its unlawful practices until compelled by court order to abandon them, Bethlehem with great solemnity (and even greater hypocrisy); praising the virtues of repose and mouthing the slogans of *res judicata, stare decisis* and collateral estoppel; noting the company's deep (albeit purely philosophical) concern with the effective enforcement of Title VII; urges this Court to give serious consideration to the proposition that the Attorney General of the United States has vested in the Bethlehem Steel Corporation an irrevocable license indefinitely to discriminate against its black employees. It is to this preposterous suggestion that Respondents are compelled to address themselves. We do so noting that the Court of Appeals for the Second Circuit was clearly correct when it rejected as absurd the "policy" arguments made by Petitioner and gave short shrift to the legal slogans offered in support of a judicial ruling in favor of a policy encouraging racial discrimination. That Court held that since Plaintiffs in the district court were neither parties to the Justice Department suit nor in privity with the Justice Department, they could not be bound as a matter of *res judicata* or collateral estoppel by the decision in *United States* v. *Bethlehem;* the Second Circuit also held that since "the Government did not seek relief in the case of recall after layoff . . . the earlier decision [does not] bind us on the basis of *stare decisis.*" It remanded the case to the district court to fashion "full, fair, just and adequate relief."

Bethlehem sought and was denied rehearing and rehearing *en banc* by the Second Circuit. It did, however, obtain a stay of the mandate of the Second Circuit pending decision of this petition. Thus, a hearing on the ap-

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propriate relief to be granted and implementation of such relief awaits the disposition of this petition.

SUMMARY OF ARGUMENT

Bethlehem asserts three grounds which it claims are adequate to justify Supreme Court review. First, it claims that general policy considerations in favor of finality dictate that it obtained irrevocable sanction for its discriminatory practices. Second, it claims that *res judicata* and/or collateral estoppel preclude its discriminatory practices from being challenged by Respondents. Third, it argues that (apparently on the basis of *stare decisis*) that no relief against its discriminatory practices other than that requested and obtained by the Attorney General may be had. We show below that these arguments are wholly without merit. The *res judicata* and collateral estoppel arguments fail because private parties are not in privity with the Attorney General; petitioner's position has been rejected not only by the Court below and a district court in California, but also by the Attorney General and the EEOC. The *stare decisis* argument fails because, as the Court below held, the relief sought in the instant case was not an issue in *U. S.* v. *Bethlehem*. Other than the *res judicata* and *stare decisis* arguments there is no legal theory supporting finality Bethlehem's "policy" argument in favor of giving it a license to discriminate; to do so would be at odds with the national policy against racial discrimination. Moreover, this case involves interpretation of a statute which was amended subsequent to the bringing of this case and therefore the case is not of sufficiently general applicability to merit Supreme Court review. Finally, there is simply no reason for the Supreme Court to reach out for the issues raised at this interlocutory stage.

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ARGUMENT

I.

There Is No Basis for Asserting Res Judicata or Collateral Estoppel.

The Court of Appeals in the instant case made short shrift of Petitioner's contention that *res judicata* or collateral estoppel were applicable to the present case:

> "For purposes of res judicata or collateral estoppel, the private citizens in this case are not bound by the Attorney General's action in the former case since they neither were parties to it, *NLRB* v. *Lannon Manufacturing Co.*, 226 F.2d 194, 199 (6th Cir. 1955), *rev'd on other grounds sub nom. Amalgamated Meat Cutters* v. *NLRB*, 352 U.S. 153 (1956), nor have interests such as to be in privity with the Attorney General. Cf. *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538-39 (1972) (intervention by union members permitted in Labor-Management Reporting and Disclosure Act litigation brought by the Secretary of Labor). Therefore, the judgment in the previous case does not have conclusive force here. See Restatement of Judgments §93 et seq. (1942); 1B J. Moore, Federal Practice ¶0.411[1] (2d ed. 1965). See also *Hartford Accident & Indemnity Co.* v. *Jasper*, 144 F.2d 266, 267 (9th Cir. 1944). (Slip opinion at 323)."

This Court should also summarily reject Bethlehem's contention. Under Title VII as originally enacted,[3] the

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3. Title VII was amended by the Equal Opportunity Act of 1972. The suit by the Attorney General and the instant action were brought under the old statute prior to its amendments. No argument is asserted that these new amendments govern the instant case. Petitioner's reference to them is apparently only as evidence of legislative intent under the old law.

United States was charged with eliminating gross violations of Title VII ("pattern[s] or practice[s] of resistance to the full enjoyment of any of the rights secured by this title. . . ." 42 U.S.C. §2000e-6). The aggrieved person was provided with an individual right of action to secure redress for personal injury. 42 U.S.C. §2000e-5(e). The prerequisites for this action included the submission of a charge of discrimination to EEOC and the issuance of a right to sue letter. Nothing in the Act suggested that the individual's private right under Section 706 was in any way contingent on action taken or not taken by the Attorney General. Thus, Congress did not create a representative relationship between the Attorney General and private parties.[4] Rather, Congress recognized the individual law suit was the primary means of enforcing individual rights.[5]

The conclusion that the Attorney General, under Section 707, does not represent private parties has been specifically approved by the Attorney General, the EEOC, and United States District Court for the Northern District of California, as well as the Second Circuit in the instant case. In *United States* v. *Operating Engineers Local 3*, ... F.Supp. ....., 4 FEP Cases 1088 (N.D. Cal. 1972), the Court ruled that where parallel actions by the Attorney General and private parties were proceeding, that the entry into a consent decree by the United States did not bar additional relief for the same violation being granted to the private party and stated that:

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4. Compare the Fair Labor Standard Act, 29 U.S.C. §216(c) which provides that the Secretary of Labor sues to collect wages "on behalf of an employee".

5. Congress recognized that both public and private interests might exist in the same situation, and provided that in such cases, where the Attorney General "certifies that the case is general public importance", he might intervene to represent the public interest. 42 U.S.C. §2000e-5(e). The provisions for intervention do not oust the private litigant nor do they diminish his role as the primary source of judicial enforcement of the Act.

> "Congress provided for both private and public actions under Title VII; and given that the possibility of the two proceedings at the same time would have occurred to the drafters of Title VII, it is only reasonable to expect Congress to have prohibited such simultaneous proceedings if it wanted to." 4 FEP Cases at 1093.

In *Operating Engineers*, the United States filed a brief in which it took the position that it was not the representative of the private parties (see 4 FEP Cases at 1093); in the instant case the EEOC filed an amicus brief in the Court of Appeals in which it specifically rejected the notion that the Attorney General represented private parties under Title VII. These interpretations by both the Attorney General and the EEOC—the agencies charged with administration of these sections—are entitled to great weight. *Griggs* v. *Duke Powers, supra; Udall* v. *Tallman*, 380 U.S. 1, 85 S.Ct. 792 (1965). Moreover, there have been other cases where the private litigant and the Attorney General maintained simultaneous actions against the same defendant. See, e.g. *Vogler* v. *McCarty*, 294 F.Supp. 368 (E.D. La. 1967); *Dobbins* v. *Local 212, IBEW*, 292 F.Supp. 413 (S.D. Ohio 1968). There has never been a suggestion heretofore either that any action by the Attorney General controlled the rights of private parties seeking relief under Section 706, or that an action by the Attorney General precluded an action by the private litigant.

The litigation involving the practices of Crown Zellerbach and the United Papermakers Union is another instructive example of judicial sanction of multiple actions by private parties and the Attorney General. In this litigation, Crown Zellerbach and the United Papermakers Union were involved in litigation maintained by private litigants and the Attorney General, all involving the same basic issues of the defendants' discriminatory hiring, testing and senior-

ity practices,[6] and appropriate remedial orders were issued against the defendants in the private suit and in the suit brought by the Attorney General.

Against these authoritative interpretations of the statute on the precise point raised by petitioner, Bethlehem offers no comment. Rather, petitioner seeks help outside of the judicial interpretation of Title VII relying on two cases whose factual situations are so distinguishable from the instant case as to make them not even proximately relevant to the instant proceeding. In *Kersh Lake Drainage District* v. *Johnson*, 390 U.S. 485 (1940), one of the two authorities relied upon, the court ruled that certificate holders of a drainage district were bound by the result obtained by the Commissioners of a drainage district in litigation to collect drainage taxes. These Commissioners were specifically charged by the statute on which the certificates involved were drawn with "protecting and enforcing creditors rights on obligations issued by the District". 309 U.S. 490. It also held that the "Commissioners were comparable to corporate directors". id. at 490. It concluded that:

> "The very statutory plan from which the certificate obligations sprang contemplated that the Commissioners should represent the collective and corporate interests of the District in litigation between the District and the land owner involving matter personal to the land owner."

and that:

> "Certificate holders were not entitled to be made parties to these proceedings." id. at 491.

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6. *Hicks* v. *Crown Zellerbach Corp.*, 293 F.Supp. 104 (E.D. La. 1968); *Hicks* v. *Crown Zellerbach Corp.*, ____ F.Supp. ____, 1 FEP Cases 577 (E.D. La. 1968); *U. S.* v. *Papermakers, Local 189*, 301 F.Supp. 906 (E.D. La. 1969).

The Court likened the certificate holders to bond holders. Surely private citizens under Title VII, who have the right to bring actions in their own name and to intervene in actions brought by the Attorney General, do not bear a relationship to the Attorney General that is in any way like that of stock holder to corporate director or bond holder to indentured trustee.

The second case on which Bethlehem relies, *Heckman* v. *United States*, 224 U.S. 413 (1912), is, if anything, even further from the point. In *Heckman*, suit was brought by the United States as representative of the Cherokee nation, considered wards of the United States in a state of tutelage. The case stated that members of the tribe, who had been deprived by act of Congress of the right to alienate their individual land holdings, were not necessary parties to a suit adjudicating their rights to the land because the United States represented them for these purposes. Bethlehem refuses to realize that the Thirteenth and Fourteenth Amendments to the United States Constitution preclude this Court from treating black citizens in the same manner as wards and conquered tribes in a state of "tutelage." That Bethlehem would offer this Court such an argument demonstrates the legal and moral bankruptcy of its position. Accordingly, we respectfully submit, that Bethlehem's assertion of privity between the Attorney General is utterly without foundation and, therefore, its argument that *res judicata* or collateral estoppel should apply is baseless.

Res judicata is also inapplicable for another reason. The Attorney General's suit under Section 707 is no way the identical cause of action as the instant suit brought under Section 706 and 42 U.S.C. §1981. The Attorney General's authority requires no charge by a private party and may be brought upon certification by the Attorney General that he has probable cause to believe that a pattern or

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practice of discrimination exists. The instant case involves two separate causes of action, neither of which is the same as the pattern or practice suit under Section 707. To come into being a cause of action pursuant to Section 706 requires *inter alia*: (1) a violation of Section 703 or 704 of Title VII; (2) formal charges first, to the state fair employment authorities and then to EEOC; (3) the issuance of a suit letter by the EEOC; and (4) the bringing of suit pursuant to that letter within thirty days of its issuance. See *Miller* v. *International Paper*, 408 F.2d 283 (5th Cir. 1969). Thus, the cause of action under Section 706 is quite different from one brought under Section 707. Similarly, a cause of action under 42 U.S.C. §1981—which assures blacks the same right to make contracts as is enjoyed by white citizens—is totally distinct from a Section 707 action. In addition, as we have shown, the issue of recall from layoff was never litigated; therefore, collateral estoppel cannot apply.

II.

Stare Decisis Does Not Apply.

Bethlehem also argues that because Respondents relied on the record in *United States* v. *Bethlehem* to establish past discrimination, they are as a matter of law limited to the relief sought and obtained by the Attorney General. We take this argument to assert only that Bethlehem contends that the decision in *U. S.* v. *Bethlehem* is a binding precedent against granting relief in any way different from that sought by Attorney General i.e., that Bethlehem relies on the doctrine of *stare decisis;* to give its argument any greater breadth would be to give the prior action *res judicata* effect—and that argument has been dealt with above.

For *stare decisis* to apply, the precise issue must have been actually decided by a court as the result of an adversarial dispute. *O'Donoghue* v. *United States*, 289 U.S. 516, 550 (1933). It is clear from a review of the district

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court opinion that the issue of recall was never before the court and that that court never decided anything with respect to that issue. (See footnote 1 *supra*). And, the Court of Appeals in *U. S.* v. *Bethlehem* "touched upon" the issue of recall from layoff "only to clarify that it was an issue which was not decided in that case". *Williamson* v. *Bethlehem*, slip opinion at 321. Since neither court ever passed upon the legality of Bethlehem's system of recall, the doctrine of *stare decisis* cannot apply. Indeed, at pages 19-20 of its petition, Bethlehem concedes as much, for it admits that in its reply brief the United States removed any consideration of the issue from the court.[7]

III.

The National Policy Against Racial Discrimination Precludes Giving Bethlehem a License to Discriminate.

The first reason that Bethlehem asserts a writ should be granted is because the failure to allow the Attorney General to preclude subsequent actions by private parties will have an adverse impact on the enforcement of Title VII. We have saved consideration of this point until after the discussion of the *res judicata* and *stare decisis* points because discussion of these points, we believe, makes it clear that this "policy" argument on the part of Bethlehem has no legal basis apart from *res judicata*, collateral es-

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7. Bethlehem misrepresents to this Court that the Government requested any modification of the recall from layoff system. In the Court below, respondents set forth an exhaustive review of the papers in *U. S.* v. *Bethlehem* including the original relief sought by the United States in its proposed decree before the district court, the notice of appeal, the briefs of the parties and a letter from the Assistant Attorney General for the Civil Rights Division stating that respondents were seeking "relief which the government did not request". The Second Circuit interpreting the opinion of a panel of its own judges concluded that "the Government expressly did not seek the relief." *Williamson*, slip opinion at 322. We submit that there is no reason for the Supreme Court to review this finding of fact.

toppel and *stare decisis*. As we showed above, in our discussion of the relevant statutory language, there is simply no support for Bethlehem's assertion that anything in Title VII would give the conclusive effect it suggests to an action brought by an Attorney General under Title VII. Accordingly, we submit that its policy arguments are better addressed to the legislature which enacted the statutory scheme than to the Supreme Court.

However, in view of the possibility that this Court has these arguments before it, we wish to note our total disagreement with them. Manifestly, the national policy against racial discrimination—which this Court has stated to be a policy "of the highest priority", *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 88 S.Ct. 964 (1968)—far outweighs any of the interest in finality asserted by petitioner, particularly when what Petitioner seeks is final judicial approval of a policy of racial discrimination.

Congress, the Courts and the Executive intended that a broad range of parallel and overlapping remedies for racial discrimination in employment be available. See, *Young* v. *ITT*, 438 F.2d 757 (3d Cir. 1971). The statutory remedies for employment discrimination include the Civil Rights Act of 1886 (42 U.S.C. §1981—one of the provisions under which this action is brought); the Civil Rights Act of 1871 (42 U.S.C. §1983—which applies to employment discrimination involving state action); a private action under Section 706 of Title VII; an enforcement action by the Equal Employment Opportunity Commission under Section 706 of Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972; and a pattern and practice suit under Title VII. The President has issued a series of executive orders dating back to 1941 forbidding racial discrimination by gov-

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ernment contractors. The latest major revision of these executive orders, E.O. 11246, created an Office of Federal Contract Compliance which administers a broad-ranging system to regulate the employment practices of employers with whom the government contracts. Moreover, certain regulatory agencies have recognized their responsibility not to sanction or support racial discrimination in the industries they regulate and began proceedings against these industries. See e.g., In the Matter of In Re Petitions filed by EEOC, FCC, Docket No. 19143 (Proceedings against AT&T).

In addition, many states have remedies for racial discrimination which under Section 706 must be resorted to prior to invoking federal jurisdiction. In no case is resort to the state remedy a bar to a separate federal action. See *EEOC* v. *Cement Masons, Local 770,* ..... F. Supp. ....., 1 FEP Cases 189 (S.D. N.Y. 1967); *Spell* v. *Theatrical Local 77,* ..... F.Supp. ....., 1 FEP Cases 851 (D. N.J. 1969).[8]

Bethlehem's other attempts at manufacturing a legislative intent which supports its novel theories are not surprisingly unsupported by any citation to the legislative history of the 1972 amendments. We see no point in reciting all the legislative history omitted by petitioner. We would

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8. Petitioners' contention that the 1972 amendment to Section 706(b) which provides that in *investigating* a charge, *the EEOC* "shall accord substantial weight to final findings and orders" of state and local authorities evidences a congressional policy against multiple suits is clearly wrong. First of all, this provision only requires that substantial weight, not binding effect, be given to orders of state authorities. Thus, Congress refused to allow these authorities the power which they contend this Court should manufacture for the Attorney General. Second, the provision quoted provides only to EEOC. Thus, even if EEOC gave binding effect to a state authority and therefore dismissed a charge, the employee, under Section 706(f) (1), would have the right to bring an action in federal court.

point out, however, that as the court below indicated, Congress in passing the 1972 amendments was careful to preserve the private right of action. It did this in a number of ways. First, although it gave the EEOC new power to enforce the act by federal court suit based directly on a private charge, it provided for intervention rights in that suit. Second, it provided that if EEOC determined to settle a case prior to suit by means of conciliation, the charging party could still sue on his charge unless he agreed to the conciliation agreement.

> if . . . the Commission has not entered into a conciliation agreement *to which the person aggrieved is a party* . . . a civil action may be brought . . . by the person claiming to be aggrieved. Section 706(f)(1).

Third, during the passage of the 1972 Act, attempts to repeal provisions of the 1866 Civil Rights Act were defeated. See 118 Cong. Rec. S.1526 (Daily Edition February 9, 1972); 118 Cong. Rec. S.1797 (Daily Edition February 15, 1972). And the Senate Committee made it clear that neither the "provisions regarding the individual's right to sue under Title VII nor any of the provisions of this bill are meant to affect existing rights granted under other laws" S. Rep. No. 415 at 24. See generally, G. Sape and T. Hart; *Title VII Reconsidered—The Equal Employment Opportunity Act of 1972*, 40 G.W.U. Law Rev. 824, 884-888 (1972).

Finally, we note that Bethlehem's argument that failure to accord finality to agreements reached between the Attorney General and discriminators will discourage voluntary compliance by those discriminators is pure sophistry. Bethlehem's notion of "voluntary compliance" is well illustrated by its conduct in the present case. After stipulating to practices which the district court held created "a sorry image", 312 F.Supp. at 979, Bethlehem spent almost

four years litigating with the government over appropriate relief. By and large the "cooperation" of Bethlehem with the government consisted of entering into a stipulation of facts which the government would have had no difficulty proving, and agreeing to stop some of the more blatant practices of discriminatory assignment, like falsifying test scores. Moreover, even after a judicial determination that its seniority and transfer provisions at Lackawanna were unlawful, Bethlehem continued these very practices at its Sparrows Point, Maryland plant, even though the Second Circuit in *U. S.* v. *Bethlehem* noted that the Sparrows Point situation was identical to that at Lackawanna and, therefore, equally unlawful. See *U. S.* v. *Bethlehem*, 446 F.2d at 664-65. Moreover, on January 15, 1973, the Secretary of Labor issued an order which paralleled that rendered by the Second Circuit in *U. S.* v. *Bethlehem* over a year and a half before. This marked the first time the Secretary acting pursuant to E.O. 11246 had ever ordered such relief.

Rather than rely on Bethlehem's arguments concerning effective enforcement of Title VII, we submit that this court should look to the position of the EEOC and the Attorney General as well as the Court below. Unlike Bethlehem these institutions do not find their interpretation of the law hampered by a desire to continue unlawful employment practices. In the court below, the EEOC filed an *amicus* brief in which it argued against finality and stated that "the amended Acts made it clear, however, that the government is still not to have the last word in the attack on employment discrimination." Similarly, the United States in *U. S.* v. *Operating Engineers, supra*, filed a brief in which it supported the right of private parties to obtain relief beyond that which the United States had obtained pursuant to a consent decree. In that case, the Court rejected finality of such decrees.

IV.

The Issues Raised by Bethlehem Are Not Substantial Enough to Merit Supreme Court Review.

From this review of the points raised by Bethlehem in favor of granting its petition, we submit that it is clear that the issues are not of a character which would justify Supreme Court review. None of the arguments raised by Bethlehem indicate any conflict among the circuits on any of the issues raised. Moreover, its attempt to find a conflict on the *res judicata* questions between decisions of this court and the decision of the Second Circuit are clearly baseless. Nor are the issues raised of such general applicability or importance as to justify Supreme Court review. They apply only to suits brought by the Attorney General whose power to bring pattern and practice suits expires in 1974. Any consideration of the effect of EEOC enforcement on a private right of action should await a case where that factual issue has been raised. The arguments in favor of finality on the basis of *res judicata*, collateral estoppel and policy, are so insubstantial on their face as to not merit review. The *stare decisis* argument, which involves the interpretation by the Second Circuit of its own opinion and decree hardly merits review by this court, especially when it is considered that none of the judges who rendered the original decree in *U. S.* v. *Bethlehem* were willing to even request a vote on Bethlehem's request for rehearing *en banc*.

V.

The Supreme Court Review at This Interlocutory Stage Is Inappropriate.

In its petition Bethlehem asks this Court to reach out for the issues it presents, even though all that the Second Circuit has done is to remand the case to the district court

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for a hearing on the appropriate relief. Until such relief is ordered by the district court, there is no guarantee that relief "inconsistent" with the relief granted in *United States* v. *Bethlehem* will, in fact, be granted. Bethlehem offers no adequate reason why this Court should adjudicate an issue which it may never be necessary for it to do.

CONCLUSION

For all of the foregoing reasons, Bethlehem's petition for writ of certiorari should be denied. Because Bethlehem has obtained a stay of the mandate of the Court below pending disposition of the petition, we respectfully urge that this disposition be expedited.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1004

BETHLEHEM STEEL CORPORATION,

Petitioner,

v.

GEORGE H. WILLIAMSON, JR., TIMOTHY SMITH, JAMES B. LINDSAY, EDWARD GREEN, JR., WILLIAM A. CLARK and VELVET BROWN, JR.,

Respondents.

REPLY BRIEF FOR PETITIONER BETHLEHEM STEEL CORPORATION

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March 2, 1973

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REPLY BRIEF FOR PETITIONER BETHLEHEM STEEL CORPORATION

Statement

Respondents' brief in opposition to Bethlehem's petition for certiorari conveys the false impression that this litigation involves present, systematic and admitted discrimination against black employees at Bethlehem's Lackawanna Plant and that such discrimination continues because the United States sought and obtained only limited relief in *United States* v. *Bethlehem*.*

These arguments constitute such a flagrant mischaracterization of the results achieved in the United States'

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* United States v. Bethlehem Steel Corp., 312 F. Supp. 977 (W.D.N.Y. 1970), *modified*, 446 F.2d 652 (2d Cir. 1971). The opinion of the court of appeals is set out at Appendix C-1 to Bethlehem's Petition. All citations to that opinion will be to that appendix, *e.g.*, C-1 at 653.

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action as to compel submission of this reply brief in order to clarify the following points:

(1) *United States* v. *Bethlehem* was a broad and vigorously prosecuted pattern-or-practice suit in which the Government obtained comprehensive relief for black employees at the Lackawanna Plant, including respondents. In that case, the court of appeals decided the maximum extent, consistent with safe and efficient operation of the Plant, to which the seniority and transfer provisions of the collective bargaining agreements between the Union and Bethlehem could be modified to provide relief from the continuing effects of past discrimination.

(2) Respondents' assertions that Bethlehem is presently pursuing intentional discriminatory practices at the Lackawanna Plant and has admitted such present discrimination are wholly unfounded and obviously designed to divert attention from the important legal issues and policy questions concerning the interpretation and administration of Title VII presented by Bethlehem's petition.

Argument

1. *United States* v. *Bethlehem.*

The Attorney General commenced *United States* v. *Bethlehem* on December 6, 1967, seeking not "limited relief" as argued by respondents, but rather ". . . an order enjoining the defendant . . . from engaging in any racially discriminatory employment practice . . ." including:

(1) discriminatory application of qualifying criteria for hiring, referring, transferring and assigning black employees vis à vis whites;

(2) referring and assigning black employees to less desirable jobs and white employees with similar or lower qualifications to more desirable jobs;

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(3) discrimination in the application of standards for admission to plant apprenticeship programs;

(4) discrimination in providing opportunities for advancement;

(5) engaging in any other discriminatory conduct as to recruiting, hiring, referral, transfer or assignments; and

(6) failing or refusing to take reasonable steps to correct the effects of past discriminatory practices (App. at 6-7*).

The complaint was amended on May 15, 1968, to join the United Steelworkers of America and five of its locals (the Unions) as defendants, alleging that "[c]ertain provisions of the collective bargaining agreements entered into between Bethlehem and the defendant unions perpetuate the effects of the discriminatory acts and practices of Bethlehem..." (App. at 11). The amended complaint sought to "... enjoin Bethlehem and the defendant unions . . . from failing or refusing to take all reasonable steps to alter the collective bargaining agreements so as to correct the effects of past racial discrimination..." (App. at 12).

Promptly after commencement of the suit, Bethlehem and the Attorney General conducted an intensive investigation into the facts of the alleged discrimination at the Lackawanna Plant. The Government was given an on-site office and provided with use of the Company's computer, accounting, duplicating and clerical employees. Extensive employee interviews were conducted and documents produced without recourse to subpoenas, depositions or interrogatories.

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* References are to the record in *United States* v. *Bethlehem* upon which respondents place sole reliance in their request for preliminary relief. Copies of the portions of the Appendix in that action which are referred to herein have been filed with the Clerk of the Court.

Exhaustive statistical studies were prepared on the racial distribution of employees at the Plant and various other subjects. Those joint investigations extended beyond the limits of even the broad amended complaint into areas such as Company-owned housing as well as schools and recreational facilities in the Lackawanna area.

After more than seven months of investigation, Bethlehem and the Government entered into a 78-page stipulation of fact in which Bethlehem conceded that black employees had in the past been discriminatorily assigned and had been denied equal advancement opportunities (App. at 21-98). At the same time, the Government conceded that these practices had ceased by October of 1967.

Two more months of investigation and negotiation produced a second stipulation of fact covering the provisions and operations of the existing collective bargaining agreements. Layoff, recall and transfer procedures which the Government proposed to modify were among the subjects covered by this stipulation (App. at 102-05).

Prior to trial, agreement was reached on the terms of the decree which was ultimately entered by the district court regarding all aspects of the broad relief originally sought by the Government except its proposed modifications of the seniority and transfer practices. The principal issue which remained for trial involved the extent to which the collective bargaining agreements should be modified, consistent with the safe and efficient operation of the Plant, in order to eliminate vestiges of past discrimination.

The case was tried over a period of nine days in November 1968 and January 1969 and a decision was rendered on April 13, 1970. The relief granted, embodying that previously agreed upon, included the following:

> (1) forbidding the assignment of black employees to eleven specified departments on a discriminatory basis;

(2) establishment of procedures to eliminate discriminatory standards for hiring, recall, assignment and transfer;

(3) independent validation of all employment screening tests and the electrical and mechanical tests to assure that they were job related and establishment of specific passing scores on tests which were administered;

(4) provisions for preferential transfer opportunities based on plant seniority for all employees previously assigned to the eleven predominantly black departments;

(5) granting of preferential rights to promotion to supervisory positions for qualified black employees and periodic review of the qualifications of those employees not already promoted;

(6) establishment of objective qualifications for supervisory positions;

(7) requirement of adequate notice of apprenticeship opportunities and the standards for admission to the program;

(8) provision for offering apprenticeships to black employees hired between January 1, 1964, and October 1, 1967, who met the standards applied to the least qualified white applicant accepted for the apprentice program during that period;

(9) institution of objective criteria for admission of electronic repair trainees and notification of all non-craft employees of those standards;

(10) special provisions for notice of and admission to the bricklayer apprentice program and brickmason craft positions;

(11) reduction of the number of labor pools to increase mobility under existing collective bargaining agreements;

(12) elimination of preferences in employment, assignment, transfer, recall or promotion based on relationship to employees;

(13) implementation of a recruiting program designed to assure minorities equal opportunity; and

(14) requirements that Bethlehem make periodic reports regarding various aspects of the decree in order that both the Government and the court might monitor Bethlehem's performance under the decree (C-4).

On appeal, the Government sought to add to this broad relief the right to rate retention for transferees and the use of plant seniority in their new jobs, both of which the district court had refused to allow. It argued initially that transferees be permitted the use of plant seniority for "all purposes" (U.S. Br. at 39). The Company opposed those proposals on the ground that such modifications of the collective bargaining agreement would have disastrous effects on the safety of all employees and on the continued economic viability of the Plant (Beth. Br. at 25-51). Thereafter, as discussed at pages 18-21 of the Petition, the Government acknowledged in its reply brief that use of plant service upon recall from layoff to displace incumbent employees was inappropriate because of the adverse impact that such "bumping" would have on the safety and efficiency of the Plant.

On June 21, 1971, the court of appeals granted substantially all the relief sought by the Government. Its considered decision as to the extent to which the transfer and seniority provisions of the collective bargaining agreements could be modified consistent with the safe and efficient operation of the Plant adopted the Government's

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view that use of plant seniority to "bump" incumbent employees upon recall from layoff was not consistent with either safety or efficiency, but that limited seniority carryover and rate retention for transferees were appropriate modifications.

The court of appeals apparently still harbored serious reservations about the potential impact the modifications of the bargaining agreements would have on the operations of the Plant. On its own initiative, it limited transfer rights under the Amended Decree as follows: "A transferee's right to transfer with seniority carryover and rate retention may be exercised only once, and only during the next two years." (C-1 at 666). Thereafter, the parties alerted the court of appeals to the fact that, as a result of the then in progress industry-wide negotiations of a new collective bargaining agreement, a substantial reduction in employment would occur which would limit the speed with which transfer opportunities would be available to black employees (Joint Motion for Clarification, July 16, 1971). With the consent of the parties, the court eliminated the two-year limitation it had previously imposed (C-3 at ¶ 5(a)(3)). Despite that explicit recognition by the court of appeals of the problems presented by the 1971 reduction in employment, respondents nonetheless bottom their right to relief in the instant case on the fact that this same reduction in employment frustrated the relief granted in *United States* v. *Bethlehem*.

Respondents' attempt to portray themselves and the broad class they purport to represent under Rule 23 (*i.e.*, all "black persons who have been, are employed or might be employed by Bethlehem Steel Corporation") as employees whose interests were not served by the Government is rendered absurd by the facts concerning the Government's handling of the case, including the extensive investigations and negotiations, the breadth of the relief sought and obtained by the United States, as well as the exhaustive trial and comprehensive appellate review. The issue of whether and to what extent the seniority and transfer

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provisions of the collective bargaining agreements could be modified to eliminate the effects of past discrimination and still preserve the safety and efficiency of the Plant was thoroughly explored by the Government and fully presented to and considered by the court of appeals. Respondents are not isolated employees whose rights were not adjudicated, but are members of the class of black employees on whose behalf the United States was successful in obtaining the very broad and comprehensive relief heretofore described.

2. *Present Discrimination.*

Respondents seem to assert that this action is an effort to eliminate presently existing discriminatory practices. They claim that Bethlehem is seeking "an irrevocable license to continue these discriminatory practices" (Br. in Opp. at 3-4) and that it is trying to "delay, as long as possible, the day when it will be forced to cease its discriminatory policies" (Br. in Opp. at 2). Moreover, they contend that the Company cannot dispute that the recall system is discriminatory because it was so "designed" (Br. in Opp. at 7).

These charges are completely answered by the record in *United States* v. *Bethlehem* (on which respondents rely exclusively) which conclusively establishes that Bethlehem ceased all discriminatory employment practices no later than October 1, 1967 (C-1 at 657, 658).

Respondents' attempt to cast this case in the mold of the classic southern mill discrimination cases is as misleading as respondents' assertions of present discrimination. This case is simply not analogous to cases such as *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968) (where white and black departments were maintained and overtly discriminatory transfer procedures which had no possible business necessity justification were used to defeat mobility for black workers), and *United States* v. *Local 189*, 282 F. Supp. 39 (E.D. La. 1968), 301 F. Supp. 906 (E.D. La.),

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aff'd, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) (involving predominantly white and black lines of progression with a substantial pay differential and segregated white and black local unions with a white local having jurisdiction over access to the preferred white lines of progression).

Black employees at Lackawanna have never been placed in circumstances such as those discussed in the cases relied on by respondents. There has always been a percentage of black employees at the Plant which is greater than the black population in the Lackawanna area, and those employees have never been relegated solely to menial labor jobs, but have occupied jobs at all levels in the Plant, including those requiring skill and imposing substantial responsibilities. As the record in *United States* v. *Bethlehem* reveals, no substantial economic disparity existed despite the admitted discriminatory practices prior to October 1967. In 1970 * the average hourly earnings of black employees in the eleven predominantly black departments was 96.7% of that of employees in the other 63 departments of the Plant—$4.014 as compared with $4.149 (Ex. G-7). Among employees hired from 1955 to 1970, the black employees hired earned on the average only 2% less than the whites hired (Ex. G-7).

Moreover, the transfer and seniority system established by industry-wide negotiations, has always been racially neutral. In particular, the recall system at Lackawanna, unlike the practices described in *Quarles* and *Local 189*, is designed to promote the safe and efficient operation of the Plant by returning employees from layoff to the departments in which they have accumulated years of experience in difficult and dangerous jobs. Respondents' alternative to this system—which was rejected by both the Government and the court of appeals in *United States*

* 1970 is the last year for which statistics exist in the record of *United States* v. *Bethlehem*.

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v. *Bethlehem*—would permit inexperienced employees from other departments to occupy those jobs, producing the "unsettling effects of seniority carry-over during periods of layoff and recall" which the court of appeals found necessary to avoid (C-1 at 664).

Respondents' ill-founded efforts to associate Bethlehem with hard-core forms of discrimination and their attempt to minimize the significance of the Government's prior suit are obviously intended to obscure the serious issues of law and policy questions presented by Bethlehem's petition. Respondents' inflammatory remarks should not divert attention from the principal point presented to this Court—that the future efficacy of Title VII depends upon according the usual legal attributes of finality to judgments rendered in comprehensive pattern-or-practice suits brought by the United States.

Conclusion

Accordingly, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

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